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THE

CHANCERY PRACTICE

OF THE

STATE OF NEW-YORK.

BY

JOSEPH W. MOULTON,

Solicitor and Counsellor.

VOL. II.

NEW-YORK:

O. HALSTED, LAW BOOKSELLER,

Corner Wall and Broad-streets.

1831.

Southern District of New-York, } ss. BE IT REMEMBERED, That on the 11th day of January, A. D. 1831, in the fifty-fifth year of the Independence of the United States of America, JOSEPH W. MOULTON, of the said District, hath deposited in this office the Title of a Book, the right whereof he claims as Author, in the words following, to wit:

"The Chancery Practice of the State of New-York, by "Joseph W. Moulton, Solicitor and Counsellor." VOL. II.

IN CONFORMITY to the Act of Congress of the United States, entitled "An act for the Encouragement of Learning, by se- "curing the Copies of Maps, Charts, and Books, to the Au- "thors and Proprietors of such Copies, during the time therein "mentioned;" and also to an Act, entitled, "An Act supple- "mentary to an Act, entitled, "An Act for the Encourage- "ment of Learning by securing the Copies of Maps, Charts and "Books, to the Authors and Priprietors of such Copies, during "the Times therein mentioned, and extending the Benefits "thereof to the Arts of Designing, Engraving and Etching His- "torical and other Prints."

FREDERIC I. BETTS,
Clerk of the Southern District of New-York.

DVERTISEMENT.

Since the publication of the first Volume, the Author has received, through the favor of the Chancellor, a large body of Original Materials which will greatly enhance the value of the work as a Book of authority. Many of the precedents, especially orders and decrees will be recognized as *authority*, having been drawn, as was usually the fact, or *settled* and approved by the present and former Chancellors in causes brought before them for adjudication. Those of the Court for the Correction of Errors were obtained from the minutes of that court, and they are also of the highest authority. To impart additional utility to these forms, the reports of the causes have been cited, or the names and dates of those which have never been reported. Upon examining and arranging these, and other manuscript materials, particularly those of a professional gentleman to whom I have before, with great pleasure, made my acknowledgments, I found it impossible to do justice to the work in each department of the subject, by limiting it to two small volumes. Another will therefore become necessary; and it has been so far prepared, that its publication may be soon expected.

New-York, January 1, 1831.

ENGLISH AUTHORITIES.

Some of those cited in this volume are :

M. & M., Montagu & Macarthur's Bankrupt Cases ; Rose ditto ; Buck ditto ; 3d Russell's Chancery Reports, being a Continuation of Turner & Russell ; Tamlyn's Reports (Vice Chancellor) ; Hogan's Reports (Irish Rolls) ; T. & V., Turner's Practice by Venables, 6th ed. 1825 ; Grant's Practice, 2d ed. 1829 ; Newland's Practice, 3d ed. 1830.

ANALYSIS AND CONTENTS

OF

VOLUME II.

This Volume pursues the Analysis of the first, [See v. 1. p. 1-3.] to the end of the 2d Chapter, and consequently comprises the general outline of practice applicable to petitions and bills, according to the first of the three divisions of the work, viz.

Preliminary Views and Proceedings.

- 1. The court and its officers, ch. 1. § 1-19.
  - 1. The court.
    - Powers of the court vested in the chancellor; regulation of practice in proceedings before the vice-chancellor, § 7.
  - 2. Officers:
    - Vice-chancellors, § 9.
    - Register, &c. § 12.
    - Sol'rs and coun'rs, admission, &c. § 17.
- 2. Petitions and Bills, or the general outline of practice in relation to both, confined particularly to the first, and embodied for future reference for the purpose of illustrating, without interrupting, the regular chain of proceedings by either. Ch. II. § 1-85.
  - 1. Petitions, ib. § 1-5.
    - 1. Their kinds, and how distinguished from motions, ib.

2. Their formal parts and requisites, § 5-9. same requisites to bills, as to averment, engrossment, jurat, &c.
   1 Formal parts, § 5. p. 20.
   2. Verification, &c. § 6. p. 23.
      1. Affidavits, § 7. p. 24-31.
      2. Certificates and exemplification, p. 31-33.
      3. Jurat, § 8. p. 33-35.
2. Services, § 10-13.
   1. General rule, &c. § 10-11.
      1. Orders to show cause, for temporary relief and substituted service, § 12. p. 37, &c.
      2. Service on solicitor or agent, notice of death of an agent, § 13. p. 39.
3. Intermediate proceedings to hearing, § 14.
   1. Notice of presenting petition, p. 39.
   2. Motions, p. 41.
      1. Notice, 42-3.
      2. Motion days and terms of vice-chancellors, § 15. p. 43.
   3. Preparations for hearing, ib. § 14-27.
      1. Presentation and adjournment, § 61. p. 44.
      2. Copies, points, abstract, brief, affivits of service, &c. § 17. p. 47-58.
      3. Further time, &c. § 19. p. 58.
      4. Exceptions for scandal or impertinence, § 20. p. 59.
4. Hearing orders and decrees, ib. § 16, 21, 24, 27.
   1. Hearing, ib. p. 60. 69.
      1. Dismissal, interlocutory costs, precept and commitment, § 21. p. 60.
      2. Motions to discharge orders for irregularity or set aside default, § 22, 23. p. 68 69.
      3. Hearing orders and decrees.
   2. Orders and decrees.
      1 Pro confesso, opening same, or denying the motion, § 25. p. 69.
      2. Referring causes to vice-chancellors, § 26. p. 72

3. Minutes of decree, § 27. p. 72..
4. Orders of course, p. 73.
5. Orders by consent, § 31. p. 75.
6. Formal parts of orders and decrees, § 32. p. 78.
7. Specimens of orders and their use, p. 81, &c.
8. Service of orders & decrees, § 35. p. 87.

3. Modes of settling fact or law, § 36-55. p. 90, &c. 256, &c.
   1. Reference to Master, orders for, and proceedings, § 36-53. p. 90, &c. Proceedings in the Master's office, § 37-53. p. 94-256.
   2. Reference to referees, examinations, &c. § 54. p. 256-263.
   3. Special case for a court of law, p. 263-6.
   4. Action at law, 266.
   5. Feigned issue, § 55. p. 267-293.
4. Modes of opening, setting aside, or reciting orders or decrees, § 56. p. 293-5.
   1. By petition or motion to vacate, discharge, &c. p. 293, &c.
   2. Rehearing, § 57. p. 295-323.
      1. Petition for and notice, &c. § 58. p. 297.
      2. Order for re-hearing, § 59. p. 302, &c.
      3. Preparations for re-hearing, § 60. p. 304.
         1. Notices of re-hearing and affidavit of service, p. 304.
         2. Note of issue, p. 305.
         3. Points, p. 306.
      4. Re-hearing, orders and decrees thereon, § 61. p. 306-322.
      5. Second re-hearing, 322-3.
   3. Appeals, in what cases, § 62. p. 323.
      1. To the chancellor:
         1. From common pleas, § 63. p. 325., &c.
         2. Surrogates, § 64. p. 327, &c.

3. Circuit judges, § 65. p. 338, &c.
4. Vice-ch'rs, § 66. p. 341, &c.

2. To the court of errors, § 71-79 .p. 348, &c.
   1. From Chancellor.
   2. From a vice-chancellor, when the chancellor is a party, &c.
   3. From a vice-chancellor after his order is reviewed, &c. by chancellor.

3. To supreme court of the U. States, p. 397.
   1. From the final decree of the circuit court of the U. S., after a removal from the court of chancery, p. 399, &c.
   2. From the final decree of the court of errors (or the highest state court having jurisdiction) upon an appeal from the court of chancery, p. 401, &c.

5. Final decree after remittitur, § 79. p. 390, &c. 425-8.

5. Costs, § 80-82.
   1. In general, § 80. p. 430-454
   2. Bills of costs, § 81. p. 428.
   3. Taxation and taxing officers, § 82. p. 454.
      Appeal from taxation and orders thereon, p. 455, &c.

6. Enrolment and execution, § 83-85.
   1. Enrolment, abstract, docket, and transcript, § 83. p. 458
   2. Execution, § 84. p. 461.
      1. Orders for issuing execution, &c. p. 461.
      2. Orders and proceedings against sheriff, p. 462.
   3. Final satisfaction, and cancelling lien of record, p. 464.

THE PRACTICE

OF

THE COURT OF CHANCERY.

CHAPTER I.

THE COURT.

In a case recently before the Chancellor, he took occasion to bring into one view the several sections of the Revised Statutes as to the distribution of the powers of the court; and prescribed the mode in which causes and matters are to be brought to hearing before himself and the Vice Chancellors. He observed: 'When the proceedings are originally commenced before a Vice Chancellor, in a case where he has jurisdiction under the *second* section, he has as full power to hear and finally decide the cause, and to enforce the performance of any order or decree therein, and to revise and correct the proceedings of any inferior officer of the court, as the Chancellor himself. But all decrees and orders made by him are subject to be reversed, discharged or altered by the Chancellor, on appeal. (2 *R. S.* 177. § 57.) Where a cause commenced before a Vice Chancellor is in readiness for hearing, the proceedings may be removed, and the cause heard before the Chancellor in person, where from the difficulty of the case, or for any other reason, the latter may think proper so to direct. (2 *R. S.* 178. § 63.) If a cause is brought before the Chancellor, under this provision of the revised statutes, the whole case is before him. The orders and decrees made therein by the

See § 7. Vol. 1. p. 10-11.(*a*) Powers of Chancellor: regulation of hearings, and practice.

(*a*) The chapters and sections of the first volume are those of the present. Where a ch. and §. are referred to in this. without designating the particular volume. the reference is to both volumes..

CHAP I.

Chancellor, are to be entered with the Register or assistant Register. And all subsequent proceedings are to be before the Chancellor, unless by his order the cause is again remitted to the Vice Chancellor. But where the Chancellor, or the Vice Chancellor of another circuit holds the stated term of a Vice Chancellor, as authorized by the *fifty third* section (2 *R. S.* 177. § 53.) the order, or decree, is to be entered, as made by the Chancellor, or substituted Vice Chancellor, holding the stated term of the Vice Chancellor of the particular circuit, where the proceedings were pending; and it must be entered in the office of the clerk residing in such circuit. In such cases the subsequent proceedings in the cause will remain, and be continued before the Vice Chancellor of that circuit. The *fifty third* section has made no provision for the hearing and decision of a special motion, or other collateral application in the cause, in vacation; or where it would be inconvenient for the Chancellor, or the Vice Chancellor of another circuit to hold the stated term of a Vice Chancellor who had been counsel in the cause, or who for any other reason could not hear and decide upon the motion or other application. In such a case there can be no doubt of the right of the Chancellor to direct the motion or application to be made before himself. And under the general power given by the *sixth* section, (2 *R. S.* 169. § 6.) he may authorize the same to be heard and decided by the Vice Chancellor of any other circuit, at such time and place as will be most convenient to such Vice Chancellor and to the parties in the cause.

'The *fourth* section of this title provides that the hearing or decision of any motion, or of any cause set down for hearing before the Chancellor, may be referred by his order to any Vice Chancellor, subject to the appellate jurisdiction of the Chancellor. (2 R. S. 169.) The practice of entering an order and setting down a cause for hearing, was abolished by the rule of the 4th of August, 1823. By the former practice, an order to set the cause down might be entered at any time after the cause was in readiness for hearing. The proper construction of that part of the section therefore is, that either party may apply to the Chancellor as soon as the cause is in readiness, for leave to bring the same to hearing before such Vice Chancellor as may be most convenient to the

parties or their counsel, and who has sufficient leisure to hear and decide the cause. The petition on which such application is founded, should state the nature of the suit, and show that it is in readiness for hearing, either upon bill and answer, plea or demurrer, or on pleadings and proofs, or otherwise. And due notice of the application must be given to the adverse party. If the parties neglect to make such application, and more causes are placed upon the calendar of the Chancellor than he is able to hear and decide, he will, without the request of either party, refer such causes as he is unable to hear and decide in person to such Vice Chancellor as is most convenient. Under this provision of the revised statutes the Chancellor will retain such causes to be heard before himself as will, from the nature of the litigation, or the amount in controversy, be likely to be carried up by appeal; and also such causes as have been partially examined by him on the merits upon motion to dissolve an injunction, or otherwise. Mortgage cases, and other causes in which there is no real litigation, and which are entitled to a preference by being placed in either of the three first classes on the calendar, will not be referred to a Vice Chancellor, unless some special reasons are shown which may render such reference necessary.

'When the order is general, referring the cause to a Vice Chancellor to hear and decide the same, the whole cause is to be considered before the Vice Chancellor, as fully as if the original proceedings had been commenced before him; subject to the restrictions which are contained in the third section. And all motions, petitions, and other questions which are subsequently made, or presented, or which may arise in the cause, must be heard and decided by the Vice Chancellor, unless otherwise specially directed in the order of reference. But where a special motion or petition which only relates to some collateral matter, or particular branch of the cause, is referred to a Vice Chancellor to hear and decide thereon, the cause still remains before the Chancellor. Every proceeding which is necessary or proper to enable the Vice Chancellor to decide the particular matter referred to him, may be done under his order or direction. He may therefore direct a reference to a master to ascertain facts, make an order for the production of books

CHAP. I.

and papers, &c; and may enforce the observance of any such order made by him in the same manner as if the whole case was before him. As to every other branch of the cause, the proceedings must still be had before the Chancellor, as if no such reference of the particular matter had been made.

'Even in these cases of a reference of a motion or other special application to a Vice Chancellor, the authority given to the Chancellor by the sixth section is sufficiently extensive to enable him to direct all other questions and proceedings in the cause, to be had and heard before the Vice Chancellor to whom the particular matter is referred. In such a case a special provision to that effect may be inserted in the order of reference.'

§ 9. Vol. 1. p. 11.

James Vanderpoel is now Vice Chancellor of the 3d, and Addison Gardiner of the 8th circuit.

§ 11. See vol. 1. p. 12. Oath of Office.(a)

'I do solemnly swear,' *or* 'affirm,' as the case may be, 'that I will support the constitution of the United States, and the constitution of the state of New-York, and that I will faithfully discharge the duties of the office of (*Solicitor of the Court of Chancery*, &c. See Vol. I. p. 11, 12.) according to the best of my ability.'(b)

§ 12. Vol. 1. p. 12. Reg. Asst. Clerks. Office hours.

The office hours of the Register and Assistant Register, &c. in the city of New-York are, by a recent act,(c) required to be from 9 A. M. to 4 P. M.

§ 17. See Vol. I. p 14. Solicitor's and Counsellor's, admission. No 1. certificate of commencement of clerkship. 2. Certificate of allowance for classical studies. 3 Order for term of clerkship. 4. Certified

The majority of candidates for admission are those already licensed in the supreme court. In such cases, the forms No. 1 to 5. are unnecessary. The candidates leave their licenses with the Register or Assistant Register, (the present proceeding being before the Chancellor, Vol. 1. p. 37-9.) who will attend to the application, obtain and enter the order No. 6. and give notice to the applicant accordingly. The examination is usually in term, though the order may be applied for on a special motion day, (Vol. 1. ch. 11. § 15.) and admission obtained in vacation. The Chancellor, except when he chooses to examine personally, refers it to a Vice-Chancellor or experienced Solicitor and Counsellor; or in term, will name perhaps three Solicitors and Counsellors for the

(a) The oath or *affirmation* (see post ch. 2. § 7, 8.) is taken, subscribed and deposited in the mode directed by 1 R. S. 119.

(b) Const. of N. Y. art. 6. § 1. 1 R. S. 119

(c) Act to amend certain provisions of the Revised Statutes, passed April 20th, 1830.

examination of all candidates, who at a convenient time and place ascertain the qualifications and character of the candidate, and report accordingly. The successful applicant obtains and delivers the report No. 7. to the Register, &c. who enters the order No. 8. for admission, and administers the oath, No. 9. in presence of the Chancellor. The oath is prefixed to the Roll of Solicitors or Counsellors, and signed, and the license, No. 10. sealed and certified by the Register, and signed by the Chancellor. Where the application is not founded upon previous license the proceedings will then be:

copy of said order.
5. Certificate of clerkship.
6. Order for examination.
7 Report of Vice Chancellor or Examiners.
8. Order for admission.
9. Oath.
10. License.

No. 1. *A Certificate of Commencement of Clerkship:*

'I certify that G. H. has this day commenced his clerkship with me, as a student in Chancery. Utica, January 1 1830. N. W. Vice Chancellor of the fifth circuit, *or* H. R. S. a *practicing* (*a*) Solicitor of said court.'(*b*)

Take this certificate to the Chancellor, or a Vice Chancellor, who upon satisfactory evidence, such as a diploma, affidavit of an instructor, or affidavit of the student himself, will grant:

2. *A Certificate of Allowance for Classical Studies.*

'It appearing satisfactorily to me, that the above named G. H. has pursued classical studies for *four* years since he arrived at the age of fourteen, let the term of his clerkship be *three* years, and an order be entered accordingly. January, 1. 1830. R. H. W. *or* N. W. Vice Chancellor of the fifth circuit.' File the certificate, No. 1. and No. 2. with the Register, &c. (Vol. 1. p. 37, 8.) who will enter:

3. *An Order for the Term of Clerkship.*

'At a court of Chancery, held for the state of New-York, at *the city of New-York*, (*or* town of Utica,) on the *first* day of *January*, one thousand eight hundred and *thirty*: Present—Reuben H. Walworth, Chancellor, (*or* Nathan Williams, Vice Chancellor of the fifth circuit.(*c*)

(*a*) The application being *ex parte*, the applicant should shew every thing necessary to bring him within the rules entitling him to admission. Sed vide, 3 Cowen 22.

(*b* Articles of clerkship are seldom entered into, see a form Tidd's Forms, ch. 2. § 1. See Archbold's forms, p. 1, 2. The *minor* himself would not be bound by such articles. See 2 Russ. 357.

(*c*) As to caption and form of orders, see ch. 2. § 32.

CHAP. I. In the matter of the clerkship of ——. On filing a certificate of H. R. S. of the commencement of the clerkship of G. H. as a student in chancery, and a certificate of allowance by the Chancellor (*or* Vice Chancellor of, &c.) of a period of four years for classical studies, ordered that the term of clerkship of the said G. H. be *three* years from this date.' Then, or at the expiration of the term, obtain:

4. *A Certified copy of said Order:*

Which the Register, &c. will give with the date of its entry, 'Entered January, 1, 1830,' and inscribing 'copy,' 'J. W. Assistant Register,' and:

5. *A Certificate of Clerkship:*

(*Or* certificates where the student performed his clerkship in several offices.) 'I certify that G. H. has duly served with me in my office, and under my personal direction,(*a*) a clerkship as a student in chancery —— years and —— months since the — day of ——,and that he is of good moral character. Dated, &c. N. W. Vice Chancellor, &c. *or* H. R. S. a practicing Solicitor in Chancery.' This certificate, and the certified copy of order, No. 4. may be submitted on special application to the Chancellor in term or vacation, and an order obtained for examination. But the course is, to deliver the certificate to the Register or Assistant Register at a stated term, who will certify the facts entitling the applicant to an examination, submit the same with other applications, and obtain, and enter,

6. *An Order for Examination:*

Or reference to ascertain the qualification and moral character of the applicant, viz. (Caption as before, see ch. 2. § 32.) In the matter of the application of —— for admission as a (Solicitor *or* Counsellor) in the court of Chancery. On reading and filing the certificate of the *Register* (*or* Assistant Register) of this court, by which it appears that —— is entitled to an order for his examination in relation to his qualification for admission as a —— in this court according to the standing rules and orders thereof: It is ordered that it be referred to —— to examine as to the character and

(*a*) See 4 J. 191. 3 J. 261.

qualifications of the said ——, and that the said—— report to this court, with all convenient speed, whether the said —— is of good moral character, and of sufficient learning and ability to be admitted to practice as a (Solicitor *or* Counsellor) in this court.'

The order being entered, and a certified copy delivered to the Vice Chancellor or Examiners, the next step after the examination is over, is to obtain from them, and file with the Register or Assistant Register:

7. A *Report of Examination.*

'In Chancery: In the matter of the application of —— for admission as a —— of this court: To the Chancellor of the state of New-York: The undersigned, the Vice Chancellor of the——circuit, to whom it was, by a special order of the Chancellor, bearing date, &c. referred; *or*, The undersigned Examiners to whom, by a special order of this court, bearing date, &c. it was referred during the present term, to examine as to the character and qualifications of —— of ——, for admission as a —— in this court, respectfully report, that we have duly examined the said ——, and find him to be of good moral character, and of sufficient learning and ability to become a Solicitor (*or* Counsellor) of this court. Dated at, &c. on, &c.' (Signed.) File this report with the Register or Assistant Register, who will thereupon enter:

8. *Order for Admission.*

(Caption as before.) 'On filing the report of ——, by which it appears that —— of —— is of good moral character, and of sufficient learning and ability to practice as a —— of this court: It is ordered that the said —— be admitted to practice as such ——, and that on taking the constitutional oath of office, he be licensed accordingly.' The Register or Assistant Register then attends the Chancellor, and in his presence administers:

9. *The Oath of Office,*

(In the form ante § 11.) which is prefixed to the roll of Solicitors *or* Counsellors, signed by the Solicitor, and deposited by the Register, &c. in his office.(a)

(a) 1 R. S. 119. § 22. 24.

10. *A License*

(Obtained from the stationers) is then sealed by the Register, &c., and a certificate endorsed by him that the oath required had been taken, subscribed and filed. The license is then presented to, and signed by the Chancellor.

CHAPTER II.

PETITION AND BILL.

Preliminary petitions may be seen in Chapters III. and IV.; original in Ch. V.; and collateral in various stages of a suit by petition or bill. Proceedings by original petition may properly be termed a *suit;* the word applies to any proceeding in a court of justice in which an individual pursues that remedy which the law affords him.(*a*) The adverse parties to a petition suit are denominated petitioner and respondent. Preliminary and original petitions are those which in the English practice are called '*ex parte*,' as relating only to the petitioner, and where no suit exists. Collateral or 'cause petitions:(*b*) are as diversified as the suits themselves. The object of a '*cause petition*,' it is said, is to carry a *decree* into execution, and therefore, in strictness, it should seem that a defect in a decree cannot be supplied by petition(*c*) An order made on a cause petition, cannot regularly be discharged on motion:(*d*) transfer of stock, or money, under a decree, will not be ordered on *motion*, but only by *petition*.(*e*) And it has been laid down as a general rule, that whenever a gross sum of money is applied for, it must be by petition;(*f*) but interest on a gross sum may be applied for on motion.(*g*) Where petition is the course directed by statute, (as in England in all cases of bankruptcy; for instance, for an order to enrol

§ 1-4. vol 1. p. 17--18. 26 Petitions · their divisions or kinds; distinction between petitions and *motions*.

(*a*) 2 Peters 449.

(*b*) 'A cause petition' is where the petitioner is a party to a suit to which the petition relates, or at least derives a right or title from some such party, in which case it may be termed a *cause & ex parte petition* united. Petitions are of course or special. *Ex parte* are always of the latter—*cause* petitions of *both*. 1 Grant, 147. 2d ed. 1829

(*c*) 2 Turn & Ven. Pr. 6th ed. 230. citing 12 Ves. 391. 4 Bro. C. C. 157. 316. 2 Ves. jr. 164.

(*d*) 2 Ves. 113.

(*e*) 13 Ves. 394.

(*f*) 2 T. & V. Pr. 230. See 3 Bro. C. C. 195.

(*g*) 4 Mod. 212.

CHAP. II.

the proceedings,) it must be pursued ;(*h*) and in such case, in strict proceeding, if either party desire the petition to stand over, it must be by petition ; though the application by motion is not usually objected to.(*i*) In such case also, disobedience to an order *on motion* is not a contempt.(*k*) The exceptions to a *uniform* course of proceedings *by petition* are such as applications, from necessity, that service of the petition at the last place of abode may be good,(*l*) or where there is a petition in court for permission to amend it, or to amend the order made upon it before it is drawn up at the office.(*m*)

A *motion* is in the nature of a petition to the court, by counsel *ore tenus* made in all stages of the suit, either of course, where by a standing rule, or by the known course of the court, the object of the application is to be granted without hearing the other party ; *or special*, upon notice, where the order applied for, will be granted or refused, as the court sees fit, upon the weight and reason of the matters shown by the pleadings and the necessity or justice of the application.(*f*) Great delay and expense have been spared to the suitor, by the court allowing that to be done upon motion,(*g*) which could formerly have been accomplished only by a decree ; for as Lord Eldon remarks, the practice is altered very much for the worse, if many motions which are now made to prevent fruitless litigation, do not produce the effect of terminating the dispute.(*h*) For example, a reference to ascertain if a title can be made in suit for specific performance where the record raises merely the question of title, may be ordered on motion ; and the interlocutory order made on this reference will have the effect of a decretal order as if the cause had been regularly brought on to a hearing and a decree pronounced.(*i*) [see ch. 7. § 13.] Summary applications by motion are not listened to when they involve questions of title,

(*h*) Ex parte Johnstone. In matter of Stevens, 1 Mont. & Mac. 82.
(*i*) Buck Bank. Cas. 549.
(*k*) 1 Rose 192. Buck 549. 6 Mad. 252
(*l*) Buck. 38. 200.
(*m*) 1 Mont & Mac. 82, 83. arg.
(*f*) 2. T. & V. Pr. 171. c. Prac. Reg. Wy. Ed.
(*g*) 1 T. & V. Pr. 793. c. 14. Ves. 139.
(*h*) 1 T. & V. Pr. 793. c. 1. Meriv. 375.
(*i*) 1 T. & V. Pr. 793. c. 1 Ves. & Bea. 224. 351. 1. Meriv. 19. 138. 2 Ves. & Bea. 378.

or any grave question which should be brought up in a more formal manner, and particularly where the rights of the state are involved, and the Attorney General opposes the motion.(a) *A motion* to carry into effect an arrangement by all the parties interested, for putting an end to the cause, with the consent of all parties, was refused, not only because the consent of all parties was not sufficiently shown; but because it was properly a subject matter for *petition*, and could not be effected by the summary course of motion.(b) It will be seen how motions are noticed and brought on, and what the notice of motion must express. [post § 14.] A motion for production by tenant for life, and deposit in court, of title deeds, that a remainder-man may inspect them, in order to enable him to mortgage his interest, must particularize the deeds, and the object of the required interference of the court.(c) Motions are almost in all cases *collateral* to some other proceeding. But there are some which may be termed *original motions* as they are not in aid of any existing suit. They are those which, as no particular mode of application and proceeding is prescribed by statute (for when it is, we have seen it must be strictly pursued, and in almost every intermediate step, by *petition*) may be deemed concurrent with petitions, such as a motion for habeas corpus; [ch. 4. § 39.] for the writ *ad quod damnum;* [ch. 5. § 58.] and formerly, but not, it seems, under the revised statutes, to make a submission pursuant to a stipulation therein a rule of court, in order to enforce performance of the award by process of contempt.(d)

(a) See 12 Price, 174. In the matter of the claim of the Dean and Chapter of Westminster.

(b) 11 Price 509.

(c) 12 Price 163

(d) The former act (1 R. L. 125. amended 39 Sess. ch. 216. p. 242.) which is almost an exact copy of 9 and 10. William III. (Kyd on awards 22-3. 336. 3 Bla. Com. 17.) authorised parties submitting to arbitration to agree that their submission should "*be made a rule of any court of record in this state.*" (See 5 Cowen 29. 1 Cowen 39. and note 1 Paige 293. See order on motion to make an *award* a rule of court (Eq. Draft. 611.) The revised statutes (vol. 2. p. 540-5.) authorise persons, in such submission to agree, that the judgment of any court of *law and of record* to be *designated* in such instrument, shall be rendered upon the award made pursuant to such submission. The statute regulates the mode of proceeding by arbitration and the manner of vacating or enforcing the award, and then (by § 22. ib.

CHAP. II.

§ 5.

Vol 1. p. 19. Petitions, General requisites, formal parts.

The formal parts of a petition are, 1. Title, 2. Address, 3. Introduction. 4. Case, 5. Prayer, and conclusion, 6. Jurat, 7. Signiture; arranged in this form:

IN CHANCERY.

Before the (*Vice*) Chancellor (*of*, &c)

A. B.
vs.
C. D.

To the Chancellor of the state of N. Y.

The Petition of A. B. complainant in this suit,

Respectfully sheweth:

That your Petitioner, on the —— day of —— caused his Bill of Complaint in this cause to be filed, and Subpœna to appear and answer thereto, to be issued out of and under the seal, &c. That, &c.

Your Petitioner therefore prays, that an order may be granted by this Court that an injunction issue, &c. enjoining, &c.

A. B.

G. W. S. Sol'r.

City and County of New-York, ss:

A. B. the Complainant in the title of this petition named, being on ——, &c. duly sworn, saith that the matters, &c.

Z. P. *Exam'r in Ch'y.*

p. 544.) declares that 'nothing in this title shall be construed to impair, diminish, or in any way affect the power and authority of the court of chancery over arbitrators, awards, or the parties thereto.' Bills may therefore be filed to set aside awards: and in suits in this court, matters may, by consent, still be referred to arbitration, and the award thereon made a rule of court, [see post. § 54. and vol. 1. same §.] Any other agreement also between parties, may it seems, on motion be made an order of court. The *order* states, 'that the complainant and defendant did on the —— day of ——, enter into an agreement bearing date that day, and which is signed by them, and is in the words and figures following: 'It is agreed that' &c. On motion of defendant's counsel, and upon producing said agreement praying that the same may be made an

1. *Title*; (*a*) 'In Chancery before the (*Vice*) Chancellor (*of the eighth circuit*) A B. vs. C. D. *or* if the petition be in a petition suit, 'In the matter of, &c. 2. *Address*;(*b*) To the Chancellor of the state of New-York, *or* 'To the Vice Chancellor of the —— circuit of the state of N. Y. the Chancellor being a party'. 3. *Introduction*;(*c*) The petition of C. D. the defendant in the title of this petition above named, *or* in the above entitled suit; *or* of A. B. by D. S. his next friend, complainant in this suit; *or* (in an original petition,) A. B. of —— in county of —— farmer; *or* of D. P. guardian of the estate of O. P. an infant under the age of twenty one years, and the said O. P. by D. P. her next friend complainant, &c. *or* of S. L. an infant under the age, &c. by M. O. his next friend, &c. *or* of F. G. a lunatic, &c. by H. J. his committee, &c. Respectfully showeth: 4. *Case* or stating part.(*d*) 'That on the —— day of —— your petitioner served upon ——, one of the defendants in this cause, a true copy of the certified copy of an order granted in the above cause, hereto annexed and at the same time showed to him the said annexed certified copy, and demanded of him to deliver up to

order of court, and may be observed, and performed by all parties thereto, according to the tenor and true meaning thereof, which upon hearing Mr.——, of counsel for plaintiff who consented thereto, ordered accordingly.' [2 Grant 286. 2d Ed. 1829.]

(*a*) *Title*: If the petition is in itself an original it is not entitled, for, until presented there is no suit in court. (See post. § 7. as to entitling affidavits) If collateral, it is entitled in the cause or matter in which it is presented. Where the Chancellor acts under authority of a statute,—as in case of lunacy—the petition need *not* be entitled. 'In the matter of the act," but may be 'In the matter of N. F. a lunatic (2 Russ. 449.) If the petition be irregularly entitled it may be amended, as where a petition by bankrupt (in England) contesting the validity of the commission was entitled 'In Chancery,' held irregular (in 1 Glyn. & Jam. 387. but in 2 Glyn. & J. 228. held that a petition entitled in the matter was not vitiated by having those words) was allowed to be amended. The petition is endorsed with the words 'before the Chancellor' *or* Vice Chancellor, &c. which are usually put under the first words of the title as above 'In Chancery, &c.'

(*b*) *Address*: See vol. I. p. 10. 19.

(*c*) See *post* § 7. and ch. 4. and vol. I. same ch.

(*d*) The case must be broad enough to sustain the prayer, be stated positively, or from information or belief according to the fact—refer to the documentary proof annexed in support of the averments, and avoid impertinent or scandalous matter, (see post. § 7.)

CHAP. II.

your petitioner possession of the premises mentioned, and referred to in the said order,' &c. *or* 'that your petitioner is informed *or* believes that,' &c. *or* 'that your petitioner by an order of this court bearing date the —— day —— was appointed committee of the person and estate of ——, as by reference to the certificate of the Assistant Register of this court hereunto annexed, and marked B. will more fully appear, &c. *or* that on or about the —— day, &c. he caused his bill of complaint in the above cause to be exhibited, and filed before ——, Vice Chancellor of the —— circuit; that on the same day the injunction issued thereon was duly served, &c. as appears by the affidavit of service hereto annexed, &c. 5. Prayer.(*e*) '*Wherefore your petitioner prays*,' &c., *or* '*Your petitioner therefore prays* the Chancellor to grant an order requiring,' &c. and '*that your petitioner may have such other and further relief*, *or* that the Chancellor may grant such other or further order *in the premises as the nature of the case may require*,' [see post. § 14.] *or* your petitioner therefore respectfully suggests to the Chancellor the propriety of assigning a Guardian ad litem, and a Solicitor and Counsel to the above defendants in order to defend the above suit, and he prays that the same may be done accordingly,' *or* 'Wherefore your petitioner, inasmuch as he is advised by counsel, and verily believes that no valid defence at law can be made to the said action, prays that by an order of this court, the said D. F. his Attorney, Solicitor, Counsel, and agents may be enjoined, and prohibited from the further prosecution of the said suit,' &c. *or* 'Your petitioner therefore prays an order of this court directing a reference to one of the masters thereof, to enquire into the truth of the facts herein stated, and that the said master be directed to receive as competent evidence upon the said reference, depositions taken before, &c.) *And* your petitioner shall ever pray.' 6. *Jurat*;(*f*) City and county of New-York, ss.: A. B.

(*e*) See post § 14. and vol. 1. 173-4. The forms of orders, (see post. § 28. 32. 36, &c.) may be consulted for the terms and language of petitions, affidavits, and notices of motion. The concluding words, 'And your petitioner shall ever pray, appear superflous and not taxable, see vol. 1. p. 78.

(*f*) See form of Jurat, *post* § 8. affidavits § 7. annex any additional affidavits or certificates when necessary to support the petition Endorse the title, &c. as directed § 6, 9. *post*, and vol. I.

the petitioner in the preceding petition named, and who subscribed the same, *or* F. De P. the Solicitor for A. B. the petitioner, &c. being on, &c. sworn, &c. 7. *Signature*;(*b*) A. B. *or* F. De P. Solicitor for A. B. the petitioner. &c.

§ 6. Vol. 1. p. 19. Petitions, engrossing, copying, verifying, see *post* § 7, n. 9.

Petitions and other proceedings, of which copies are to be used, must be paged, and the copies made to correspond in paging by marks of reference to the first word of each page of the original. The papers when folded are endorsed with the title of the cause or matter (the complainant's name being always placed first in the title inside and out,) and with the words 'before the Chancellor' or 'Vice Chancellor of,' &c. usually placed immediately under the words 'In Chancery.' The name of the Solicitor, if any, is also endorsed. We have seen (vol. 1. p. 21,22.) that generally, petitions must be verified by oath. The form of the oath and Jurat will appear—*post* § 8. which in ordinary cases will be sufficient. Special petitions and motions must be supported by affidavit of the party or others verifying the material facts stated, or by the pleadings and proceedings in the cause, or by proof *aliunde*. Some, especially of the *ex parte* kind, require only to be verified by the Solicitor, who may be best cognizant of the facts, when consisting of legal proceedings. Others, and of the ex parte kind also, must be, and may be *sufficiently*, verified by the production of official documents, in addition to such other evidence as may be required for merely identifying [*post* § 7.] the petitioner as being the party really entitled (*c*) In England, on petitions under acts for local improvements, for payment of money out of court, the parties are required to verify shortly by

(*b*) Petitions are sometimes required to be signed by Counsel, as in a petition of appeal, *post* § 74. and the subject of them is sometimes so important and complex, as to require them to be perused and settled, if not drawn and signed by counsel The party may prosecute or defend *in person* (ch. 3. § 1. see ch. 2. § 13.) There is no rule, as in England in bankrupt petitions, that if the petition do not on its face appear to be by the Solicitor it must be duly attested, or the signature of the petitioner authenticated without being actually attested by a solicitor: the object of the rule being to secure the responsibility of a solicitor to the propriety of the application (2 Gl. & Jam. 260. 121. 1 ib. 353. 2 Rose 83. Buck 393. 1 Mont. & Mac. 51.) see as to cross petitions,(3 Russ. 91.) and cross motions *post* § 24.

(*c*) 1 Grant. 2d ed. 2 T. & V. Pr. 229.

CHAP II.

affidavit their title, and belief that no other person has any title, or claims any interest in the estate.(*d*) The identity and title of a party, claiming money in court or transfer of stock, on arriving at age, must be shown in ordinary applications,[see post § 7. No. 5, 6. and ch. v.]

§ 7. Vol. 1 p.19. Affidavits, their object and use, scandalous or impertinent matter.

No. 1. Affidavit.

2. Declaration, or affirmation by one who declares he has conscientious scruples against taking any oath, or swearing in any form.

3. Joint and several affidavit.

4. Joint and several affidavit entitled in several causes between same parties.

5. Affidavit of age and identity of petitioner, &c.

6. Certificates to be annexed or used in proof of marriage, &c. Certifi.

An affidavit is a declaration upon oath before an authorized person, and being reduced to writing, serves as a deposition of the facts therein stated, and is used in Chancery for certifying interlocutory matter incidental to proceedings in the particular suit in which it is made; for it cannot, if to ground an order, be read in any other cause, even between the same parties; must be true in substance, with all necessary circumstances of time, place, manner, and other material incidents, be sufficient to sustain the case made by the motion or petition of which it is the groundwork; pertinent, material, not argumentative, referential, tautological, and free from scandalous and impertinent matter.(*a*) The court will discourage the abuse of its proceedings by the introduction of imputations against character which prove altogether unfounded, by withholding costs in such cases.(*b*) An affidavit made expressly for the purpose of discrediting the testimony of a person whose character stood impeached, stating particular facts of a scandalous nature, was ordered to be taken off the file, with costs, as between attorney and client.(*c*)And in some cases this has been done by the court itself, *ex mero motu;* but it should seem, that if the scandalous matter has been answered, the court will not order it to be expunged ;(*d*) and a party after replying to an affidavit cannot refer it for impertinence.(*e*) But an affidavit containing irrelevant and improper matter, after being read or looked into by the court, has been ordered not to be read in open court, except certain specified parts limited to the real question before the court.(*f*) Lord Eldon, Chancellor, sitting on bankrupt petitions, upon an application to him complaining of scandalous and irrelevant matter in an affi-

(*d*) In re Fleet-market act, 2 Y. & J. Ex.) 493.
(*a*) Dick. 150- 1 Atk. 139. 2 T. & V. Pr. 6 1 Grant. Hind.
(*b*) 1 Sim. & Stu. 206
(*c*) 2 T. & V. 2. Citing 15 Ves. 476. 18 Ves. 114. 3 V. & B. 9 3. Ord. Can. Bea. Ed. 187.
(*d*) 2 T.& V. Pr. 2. c. 18 Ves. 225.
(*e*) 2 Russ. Ch. 319.
(*f*) 1 Haggard, 689.

cate of Register, Assistant Register or Clerk.

7. Certified copies and exemplification.

davit, and praying that it might be taken off the file, and the matter expunged, in speaking of affidavits generally, observed, there were some general principles which could not be doubted: If that which is stated in an affidavit be material to the issue, it may be false, but cannot be scandalous; if relevant, it is not impertinent; though scandalous in its nature, if relevant and pertinent, it cannot be treated as scandalous; and if false, it must be dealt with in another way; but if irrelevant, and especially if also scandalous, there would be much reason to regret, that a court was not armed with the power to protect parties from the expense, its records from the stain, which too frequently arises from the introduction of irrelevant and scandalous matter. Having read the affidavit in question, he could find no ground upon which the greater part of it could be represented as material, nor could he conceive how a great part could be described as not scandalous, bearing most cruelly upon character; that he had no doubt of his power whether in bankruptcy or in causes to grant relief, and that application by any person was unnecessary. The court ought to take care, that neither in a suit or in this proceeding allegations bearing cruelly upon the moral character of individuals, and not relevant to the subject, should be put upon the record; that a very considerable proportion of the affidavit was perfectly immaterial and irrelevant, though not scandalous; and of that, some part was of such a nature, that not being material or relevant, it must be considered scandalous. Lord Eldon concluded by ordering the Solicitor who made the affidavit to pay the costs of the application and all other costs, to be taxed as *between solicitor and client*, and after payment the affidavit to be taken off the file.(g) The ordinary course in England is, before answering or replying to the affidavit or other proceeding, a reference of course; and the reference to inquire into the alleged scandal and impertinence, or as to costs of irrelevant matters extends to affidavits offered to a Master, and filed. Costs of the application to refer, and expunge the exceptionable matter, or to take the affidavit

(g) 15 Ves. 476. Ex parte Simpson, 6 Vesey, 514. 18 Ves. 114. cited 2 T. & V. Pr. 6, 7. See also 3 Ves. and B. 93. As to impertinence see 1 Turn. and Russ. 362.

CHAP. II.

off the file, are visited upon the party making, or the Solicitor drawing it.(*h*) Here the course is to file exceptions in the first instance, as a general rule in all proceedings, even before a Master; but in the latter case a reference thereupon is unnecessary, as the Master himself may examine the matter upon such exceptions. [See ch. 2. § 5. 20. 49. and ch. 8. § 15. 55. both vols.]

An affidavit verifying proceedings at law cannot be received in evidence.(*a*) An affidavit in support of a motion to take an affidavit off the file for the purpose of an indictment for perjury, should not enter into the merits of the indictment; the party should carefully avoid any assertions as to the truth or falsehood of the document; for though the order will be granted when the preparatory steps are taken, and the time of trial near at hand; yet, costs of replying to an affidavit in detail, irrelevant to the object of the motion, have been given.(*b*). A voluntary affidavit made before a person not having power of administering an oath, though if false, not punishable by statute, is indictable on the ground of its being *contra bonos mores*, and a misdemeanor at common law.(*c*) It is said there is no instance of a commitment on a foreign affidavit.(*d*) An affidavit taken abroad must be authenticated as directed by statute, in order to be received as evidence here. [See post § 8.] Where a foreign witness is to be examined, an order should be applied for, that the commissioners be at liberty to swear an interpreter to turn the answers of the witness into English, and so take them down and return them,(*e*) But depositions taken in like manner in a foreign language must be translated into English, by order obtained as of course on motion or petition, appointing some person by name, generally a Notary Public, to translate the depositions, and to be sworn to the true translation thereof, and also that it may be read at the hearing of the

(*h*) See 16 Ves. 223. 3 Atk. 391. 1 Haggard 689. 2 Younge and Jer. 536.

(*a*) Ex parte Barnes. In the matter of Daniell, 1 Mont. and Mac. Cases in Bankruptcy. 9. The affidavit was by a short-hand writer of proceedings on the same question, and in same bankruptcy, and was offered pending a petition for a new trial of an issue upon a question of usury which depended on the same witness. The affidavit was ordered off the file with costs.

(*b*) 1 Hogan's R. 132.

(*c*) 7 Vesey 419. 1 Ves. & B. 298.

(*d*) 19 Ves. 652.

(*e*) 2 Cox R. 288.

cause: the translation must be annexed to the original deposition, taken with the order to the proper officer, and sworn before him. Office copies of the translation must be obtained, and will be allowed to be read in evidence at the hearing, upon production of the order for reading the translation; but it seems the court will not part with the original deposition out of the office for the purpose of translation.(*f*)

No. 1. *Affidavit.*

Its formal parts are, 1. Title; 2. Commencement, including name and description; 3. Allegations; 4. Jurat; 5. Signature.

Title.(*a*)

'In the matter of the Petition of, *or* application for, *or* appointment of Guardian for, &c.

or

In Chancery
Before the (Vice) Chancellor, (of, &c.)

A. B.
vs.
C. D.

City and County of New-York, ss: A B. the *Complainant* in the above entitled suit,(*b*) *or* (*where no title*) G. H. of —— county of —— and state of ——

(*f*) 1 T. and V. Pr. 240. c. 7. Ves. 292.

(*a*) The affidavit should be entitled in the cause in which the motion is made.(see 1 Cowen 482.) Where there is no suit pending, but the affidavit is to be used as the foundation of a suit, it should not be entitled in any cause. The reason assigned is, that there is *at the time* no cause pending in the court, and an indictment for perjury in making such an affidavit would fail, as it could not be shown that such a cause existed in the court in which the affidavit was made. (3 Co. 345 2 ib. 499. 2 J. 371. 1 Barn. and Cress. 73.) For the same reason when a cause is pending, and it becomes necessary to entitle it, if the title of the cause is wrong, though rightly described in the body of the affidavit, it cannot be read. (2 Cowen 509.) Where an affidavit was entitled in two causes, one of which was rightly, and the other wrongly stated, and the affidavit proceeded to speak of the *cause* in the singular: held this was sufficient. (2 Cowen 581.)

(*b*) In affidavit, parties' place of residence need not be particularly described; if described as plaintiffs or defendants in the cause sufficient, and its being 'as deposed by the above named plaintiff.' instead of one of the above named plaintiffs, is immaterial, if it sufficiently appears who is the person who deposed.(2 Madd. 446.)

CHAP. II. *Wheelright, or* L. M. the *petitioner* named in the preceding petition, *or* complainant in the *title* (if entitled) of the preceding petition named, *or* O. P. of ——, agent(*c*) of —— *or* R. S. wife of —— or T. V. of ——, *executor* of the last will and testament of W. Y. deceased, *or* S. T. of ——, ——, *executor* of the last, &c. of B. R. deceased, who in his life time was executor of the last will and testament of Y. T. deceased, *or* A. B. of ——, ——, *administrator* of all and singular the goods and chattels, rights and credits which were of H. G. deceased, at the time of his death, who died intestate, *or* M. L. of ——, ——, *administrator* of all and singular the goods, chattels, rights, and credits, which were of W. H. deceased, at the time of his death, left unadministered by P. B. in his lifetime, now deceased, (and which said P. B. in his lifetime was executor of the last will and testament of the said W. H. deceased,) with the will of the said W. H. annexed(*d*) *or* G. W. S *Solicitor*(*e*) for —— the above named petitioner, *or* complainant, *or* defendant, *or* Solicitor for the complainants, —— the petitioners in the title of the foregoing petition named, *or* Solicitor for the complainant in the cause mentioned in the preceding petition, *or* B. B. clerk, *or* F. G. studant at law, in the office of G. W. S. the solicitor for the above named, &c.(*as before*) '*being duly sworn, doth depose and say*,' *or* 'maketh oath and saith', that, &c. If the petition is not verified by the party in the usual jurat affixed [post § 8.] but supported by affidavit of others, the Solicitor for instance, of the material facts, then set forth the facts, as, 'that the original bill was filed and a subpœna to appear and answer issued and served as stated in the said petition; that, &c. *or* 'that the said petition is true in substance and matter of fact,' *or* 'that on or about the —— a copy of the bill of complaint in the above cause was served upon S. M, F., Esquire, Solicitor for the defendant T. C., by one of the clerks in this deponent's office, who has since finished his clerkship, and is now absent therefrom, as appears

(*c*) Agent, see 1 Cowen 210. 134.

(*d*) see Archb. Forms. Tidd's Forms, and 2d vol. Chitty, for description of persons prosecuting or defending.

(*e*) An affidavit of the state of the cause on which a special motion is to be made, must be by the Attorney not his Clerk, unless a sufficient excuse is offered. (2 Wend. 283.)

by an entry in this deponent's register, and which he verily believes to be true,'. *And this deponant further saith, that he is informed and believes(f) that, &c. And lastly this deponant saith that, &c.*

[Sworn, &c. see Jurat § 8.]

A. B. *or.*
The mark,
×
of C. D.
Witness E. F. (*g*)

2. *Declaration or Affirmation.*

(Title and commencement as in No. 1.) —— of——, ——, being duly affirmed, 'doth solemnly, sincerely and truly, declare and affirm'(*b*) that, &c. And this affirmant doth further declare and affirm that, &c. [see Jurat, § 8.]

3. *Joint and Several Affidavit or Affirmation.(c)*

(Title and commencement as in No. 1.) A. B. of ——, Merchant, the defendant above named; E. F. of ——Auctioneer, and G. H. of——Solicitor for the above named defendant, make oath and say: (or being duly sworn, *or* affirmed, do depose *or*, &c. *as in* No. 1. No. 2.) And first this deponent A. B. for himself saith that, &c. 'and this deponent further saith that,' &c. 'and this other deponent E. F. for himself saith that,' &c. 'and this deponent G. H. for himself saith that,' &c. 'and this deponent A. B. further saith, that,' &c. 'and these several defendants, A. B. E. T. & G. F. further say, that,' &c.(*d*) *or* F. G. & J. W. S. students at law in the

(*f*) A party who cannotbe presumed to have positive knowledge of a fact, may swear according to his information and belief; and if it be not denied by the adverse party, who can swear positively upon the subject, it will be deemed as admitted. (The Attorney General v. Bank of Columbia, 1 Paige 511. 515.

(*g*) If the affidavit is read, and the mark made in presence of the officer, no witness is necessary. But in case of an illiterate person, the Master usually requires that it should be read over by some person in the presence of the deponent, and perfectly understood by him, and the signature and mark attested. [2 T. & V. Pr. 3. c. R. G 4 T R. 281. [See Jurat in this case, § 8.

(*b*) Words of the affirmation as prescribed by 2 R. S. 407.

(*c*) An affidavit of several persons by the manner of wording it may be made either joint and several, or joint, or several, (1 Grant 140. 2d ed. c. 3 Atk. 83. 818. see Jurat, post § 8.)

(*d*) Archb. Forms, 565.

CHAP. II.

office of G. W. S. Solicitor for the complainants in this cause being respectively duly sworn severally depose and say, and first the said F. G. for himself saith, that he did personally serve, &c. a subpœna, &c. And this deponent J. W. S for himself saith, that he did on the same day last aforesaid, personally serve R. M. one of the above named defendants with the said injunction and subpœna, &c.

4. *Joint and Several Affidavit in Several Causes,*(e)

In Chancery: W. T. vs. G. C. & S. his wife and S. L. administrator, &c. cause No. 1. D. S. J. guardian, &c. vs. same defendants impleaded with the same defendants, cause No. 2. City and county of New-York, ss. G. C. and S. L. two of the defendants named in each of the above entitled causes, being severally duly sworn, do depose and say, and first the said G. C. for himself saith, that, &c.

5. *Affidavit to prove Age and Identity, or verify Extracts.*

It may be necessary to identify the petitioner, and show that he has arrived at age, to enable him for instance to receive payment or transfer of funds in court; so on application in behalf of a female, who may perhaps on the day of her marriage become entitled to funds invested, it may be requisite to prove her identity and marriage. In this case, besides an affidavit of identity, a certificate of marriage by the officiating minister has been deemed sufficient of this fact. The revised statutes contain some special provisions to the same effect. [post No. 6.] In the former case, the age in England is proved by parochial extracts of the party's baptism from the parish register, of which a copy is, by an act, there evidence.(a) It is not

(e) A motion might according to the analogy to the practice in supreme court, be made by several different defendants on one set of affidavits in divers causes at the suit of the same plaintiff. and opposed on one set of affidavits in all. When one affidavit entitled in several causes, between the same parties, is sufficient, the supreme court allow but one taxation in all, viz. one fee to Attorney, one to Counsel, one brief, one copy of costs, one notice of taxation, one attendance, one service of rule, and one power to demand costs. (3 Cow. 385).

(a) 18 Ves. 204. But (1 Cox 275.) a copy of a register of baptism in the island of Guernsey, was held

made and signed as a certificate by the minister of the parish, but extracted from the parish books, or at any rate *examined* therewith by some one who can swear that he has examined and found the extract correct. There must be another affidavit identifying the applicant, unless one affidavit embrace both the *extract* and *identification*,(*b*) as follows:

(Exact copy of the registry of baptism of the party whose age and identity are wanted to be proved, viz.) H. —— 10th April, 1817, D, son of T. and M. J. of —— baptized ——, *or* whatever the entry may be. (Title and commencement as in affidavit No. 1.)

In *Chancery:* —— saith, that the above is a true copy of an entry made in the book kept by the (clerk, *or* rector *or* minister) of ——, in the said county of ——, for registering baptisms in the said ——, so far as relates to the baptism of the said D. J. and that he, this deponent carefully examined and compared the same with the said book. And this deponent further saith that the said D. J. therein named is the (*petitioner*, *complainant*, &c.) referred to by this affidavit, and in the petition, *or* pleadings (*as the case may be*) in this cause named.(*c*)

No. 6. *Certificates.*

The Revised Statutes, in relation to marriages, authorize a certificate drawn in the manner pointed out in the statutes, of a magistrate or minister to be filed and entered in the clerk's office of the city or town where the marriage was solemnized, or where either party resides, and every such original certificate, the entry thereof, or a copy of such certificate or entry, duly certified, will be received in all courts as presumptive evidence of such marriage.(*d*) If the motion be for payment of money out of court, then, in addition, obtain and produce the

insufficient in England, of a party being of age. So an examined copy of register of marriage in the Swedish Ambassador's Chapel at Paris, not evidence. (1 Esp. 353.) Extracts from documents, of a doubtful character as evidence, cannot be received in evidence. The original must be produced, that the court may judge by inspection of the admissibility even of the document itself.

(*b*) 1 Grant 236, 7. 2d ed.

(*c*) 2 Grant 15. 2d ed. The affidavit may be adapted to extracts from church registers here, and verified by the clerk, rector, or minister, himself.

(*d*) 2 R. S. 140, 41.

CHAP. II.

certificate of the Register, Assistant Register, &c. of the money being paid into the bank, and also his certificate of the money being, at the time of applying, in his hands.(e)

A certificate of the officers of the court, (and to which great credit is given,) is defined, a matter in writing under the hand of the Master, Clerk or other officer, informing the court of something under their respective administration or cognizance, that is done, not done, or misdone, which a standing or other order or mandate of the court, or their duty, or the reason of the thing, requires them to acquaint the court with.(f)

Certificate of Register, &c or Clerk not under seal. See vol. 1. ch. 2 § 9.

'In Chancery, S. B. vs. N. M. and I. L.: I certify that it appears from the register of S. S. G. Esq., formerly clerk of equity for the first circuit, now in my possession as the clerk of the Vice Chancellor of said circuit, that the bill of complaint in the above cause was filed on, &c.

J. W. Assist. Register.

Certificate of Register, &c or Clerk under seal.

'State of New-York: In Chancery: To all to whom it may concern, Know ye, that I have inspected the records of this court in my office, do find that —— was on the —— day of —— in the year —— regularly appointed by this court committee of the person and estate of —— of the town of —— in the county of —— a ——

In testimony whereof I have caused the seal of our said Court of Chancery to be hereunto affixed.

[L. S.]

———, Clerk of the——

——— Circuit.

Certified copy *with*, or if used in evidence in the same court *without* the seal of court.

7. *Certified Copies, and Exemplification of Records.*

Let the clerk superadd to the copy of the document to be used in evidence, instead of the words 'a copy,' a certificate to this effect: City and County of —— ss: I certify that I have compared the preceding copy with the original (affidavit, record, document, &c.) in my

(e) 1 Atk. 519. 2 T. and V. Pr. 175.

(f) Grant Pr. Reg. Hind. As to certificates of Masters see § 43. 49. Where a certificate of Register or Clerk is to be used as ground for an order, &c. it seems a misnomer in the christian name in the order drawn pursuant thereto, not acquiesced in or waved by actual appearance or submission would be fatal error notwithstanding it is clerical. See 1 Turn. and Russ. 94.

custody, and the same is a correct transcript therefrom, and of the whole of such original.(*a*) Dated, &c. (signed) J. W. Assistant Register.

Exemplification.

'The people of the state of New-York, by the grace of God free and independent: To all to whom these presents shall come or may concern, greeting: Know ye that we having inspected the records and proceedings in the office of the *Register* (*or* Assistant Register) of the Court of Chancery for our said state, do find a certain (*decree or decretal order, &c.*) there remaining, in a cause in which —— is complainant, and —— is defendant, in the words and figures following, to wit: (*Insert the record or document exemplified.*) All which we have caused by these presents to be exemplified, and the seal of our said Court of Chancery to be hereunto affixed. Witness, Reuben H. Walworth, Chancellor of our said state, at the City of *Albany*, the *first* day of *August*, in the year of our Lord one thousand eight hundred and *thirty*, and in the fifty *fifth* year of our independence.

L. S.

JAMES PORTER, Register, *or*
JOHN WALWORTH, Assistant Register.

Chancellor's certificate to annex to an exemplification agreeably to the acts of congress.(*b*)

I, R. H. W. Chancellor of the state of New-York, do hereby certify that the duties of clerk of this court are performed by John Walworth, Assistant Register, and that the above attestation is in due form.

(Signed) R. H. W. Chancellor of the State of New-York.

§ 8 Vol. 1. p. 21. Jurat. No. 1. jurat to affidavits or affirmations: common jurat: to affit. by one or several: to affirmation: where deponent or affirmant is illiterate. 2. Ju-

In engrossing affidavits to be sworn to, observe the utmost care to avoid erasures and interlineations of any words of substance, or they may be refused by the officer administering the oath or filing the same. Small blots or interlineations the officer usually overlooks, marking them, as existing before sworn to, in the margin: erasure with a knife is not allowed, but words are to be struck out with a pen so as to be read though thus altered.(*c*) At law an interlineation or erazure in the jurat vitiates the affidavit.(*d*) But an obvious mistake in an affidavit, as in the date of the jurat, made in support of a motion,

(*a*) 2 R. S. 403, 4. § 59. 60.
(*b*) See (Judge y's e d. of) Laws of U. S.
(*c*) 1 Grant. 139. 2d ed. 1829.
(*d*) 7 T. R. 82.

CHAP. II.

rat to petition or bill or answer

3. Jurat and certificates to affidavits, affirmation, petition, bill, or answer, *taken abroad.*

may be amended by a supplemental affidavit. The court, however, may visit upon the party guilty of such heedlessness in filing affidavits framed in a slovenly and irregular manner, the costs of any application made to the court, supported by affidavits wherein there should be such want of attention.(*c*)

No. 1. *Jurat to Affidavits or Affirmations.*

The *Common Jurat* is, 'Sworn, before me this—— day of—— 1830. W. G. Commissioner of deeds.'(*d*) *Or,* 'sworn this, &c. before me, *or* sworn and subscribed this, &c. And as the jurat ought to express the place where the affidavit is sworn,(*e*) if no place be mentioned at the beginning of the affidavit, [ante § 7. No. 1.] say, 'sworn, before me at —— on ——' &c. If sworn by two or more persons the jurat is: 'The above named deponents A. B. and C. D. were severally sworn before me on this —— day, &c. The jurat to a *declaration or affirmation,* may be: Declared and affirmed before me, on, &c. by the said ——, he having previously declared to me, that he had conscientious scruples against taking any oath, or swearing in any form.(*f*) If the affidavit be by a person who makes his mark, or one who from his signature or otherwise, *appears* to be illiterate, the jurat is: Sworn before me this —— day of ——, having been first read in my presence to the said deponent A. B. who declared he perfectly understood and approved the same; appeared so to do, and made his mark, *or* 'wrote his signature' thereto in my presence,(*g*) *or* if not read over and signed in the officer's presence: 'Sworn this —— day of —— 1830, the witness to the mark of G H. [§ 7. No 1,] being first sworn, that he had read over the contents to the said G. H. and that he saw him make his mark;(*h*) he the said G. H. declaring to me that he per-

(*c*) 12 Price 149.

(*d*) 2 Cowen 552. As to the officers, see vol. 1. p. 20. 21. Affidavits cannot be sworn before the Solicitor of the party in the cause. 12 Price 149. As to the form of administering oaths in certain cases, see 2 R. S. 407, 8.

436. n. 18 J. 103.

(*e*) 2 Ves. & B. 3. Ord. Canc. Bea. Ed. 212.

(*f*) 2 R. S. 407.

(*g*) 1 Grant 140. 2d ed. Archb. Forms. 565.

(*h*) 2 T. & V. Pr. 6th ed.

fectly understood, and approved the same, and appeared so to do. 'H. W. Commissioner to take affidavits in Chancery.'

2. *Jurat to Petition, Bill or Answer:*

'*City and County of N. Y.* ss: ——, the petitioner, *or* petitioners, *or* one of the petitioners, *or* the complainant, *or* defendant, named in the title of the foregoing petition, and who hath subscribed the same, *or* the complainant mentioned in this his bill of complaint, and who hath subscribed the same, *or* (if illiterate see No. 1.) *or* the defendant named in the above answer, and who hath signed the same, being on this —— day of —— one thousand eight hundred and ——, sworn before me, *or* severally sworn, *or* affirmed, [see § 7. No. 1-3.] did depose and say, *or* did solemnly, sincerely, and truly declare and affirm, (he the said —— having previously declared that he had conscientious scruples, &c. *ante* No. 1.) that he had read the said petition, *or* bill, *or* answer, (*or* that he had heard the preceding petition, *or* bill *or* answer read,) and knew the contents thereof; and that the same was true of his own knowledge, except as to the matters which were therein stated to be on his information or belief; and as to those matters he believed the said petition *or* bill, *or* answer to be true.' (Signed) F. De P. Jr. Master in Chancery.'(*a*)

3. *Jurat to affidavit, Petition, Bill or Answer taken out of the State,* [Vol. I. p. 21 n. (8) and p. 277, 8.(*b*)

The *Jurat* to an *Affidavit*, is in the form of a certificate: 'State of —— City of —— ss: I, —— one of the judges of the —— court of ——, do certify, that the preceding affidavit was subscribed and taken by ——, before me, on the —— day of —— in the year one

(*a*) The jurat is given in the past tense, as it states merely the substance of the oath [vol. 1. p. 21.] which is administered in the present tense: 'You do solemnly swear, &c. that you have read, &c. this petition, &c. and subscribed the same, that the same *is* true of your own knowledge, except,' &c. The petition, bill, &c. which alone is signed, bears the same relation to the above jurat, as an affidavit to the common jurat.

(*b*) In England foreign affidavits taken before a notary or other officer, and properly certified, are received. See Dick. 90. 150. 1 Jac. & Wal. 296. 180.

CHAP. II.

thousand eight hundred and —— at —— (*or* in the city and state aforesaid :) and the Jurat to a Petition, Bill or Answer may be: ' State of —— City or County of ——, ss : I ——, one of the judges of the —— court of ——, do certify that——the petitioner, *or* complainant, *or* defendant [*follow the form of the Jurat* No. 2.] did on the ——, &c. at the City and State aforesaid, *or* in the town of —— County and State aforesaid, before me subscribe the said Petition, *or* Bill *or* Answer, and being by me then and there duly sworn *or* affirmed, &c. did depose and say, &c. (continue the jurat No. 2. to the end of it.) (Signed by the judge.) Superadd the following : 'City of —— State of ——ss. I, ——, Clerk of the —— Court of —— do certify that there is a court in the —— (city *or* district, and state *or* territory aforesaid,) under the name and title aforesaid, that —— is a judge (*or* member) of the said court, and that the signature to the above certificate and jurat is the genuine signature (or proper hand writing,) of the said '——. In attestation whereof, I have hereto set my hand and affixed the seal of the said court, at —— (*or* in the city and state aforesaid) this —— day of —— in the year one thousand, &c. (*Signed and sealed by the clerk of the court.*)

L. S.

§ 9. Vol. 1. p. 21. Preparing for service, copying, &c.

In preparing for service, observe the directions given [§ 6. 8.] as to engrossing, paging, and endorsing, [§ 7.] The jurat when essential should be included in the copy to be served,(*a*) and the original affidavit must be sworn to, prior to service of such copy.(*b*) In special cases prepare a copy of the petition, &c. for the use of the court on hearing, [*post* § 16. 24.]

2. SERVICE.

§ 10 See vol. 1. p. 22 25. as to the general rule requiring services

Special petitions, whether *not in* a cause, but strictly ex parte, or *in a* cause, and yet concerning a *person* who is not in it, as they always implicate more or less, or at least are always supposed so to implicate the rights of others, besides the petitioner, are therefore never granted without being *heard* in court, *the attendance* of all parties on the matter of the petition being required,(*c*)

(*a*) See (Supreme Court,) 2 Wend. 283.
(*b*) Ib. 3 Wend. 310.
(*c*) Grant, 2d ed.

according to the English practice by an answer to the petition to that effect, and here by previous service of copies, and notice.

§ 11. Vol. I. p. 23. Distance how computed, substituted service.

Distance, as to service, has been computed by the usually travelled—not mail route—unless it be the usual one.(*b*) In cases where by the usual practice, personal service on the party is required, and it cannot be made, the court on *ex parte* motion [ante p. 18.] *before*, or in the order nisi [§ 12.] *after* presenting the petition, may allow substituted service on one of the family at the party's dwelling house, or on an agent where the principal lives abroad,(*c*) or where he has no family or agent, dispense with service altogether in cases of emergency, [vol. 1. p. 24.] on affidavit of the special circumstances, and showing due diligence, to discover the party and effect service.(*d*)

No. 1. *Order to show Cause, stay Proceedings, and for Temporary Relief.*

§ 12. See ¶ 30. Vol. I. p. 23, 24 35 No. 1. Order to show cause, and for substituted service, and mean time for stay of proceedings, or for temporary relief by injunction, &c. 2. Order *ex parte* to show cause, why an order ex parte should not be discharged.

(Caption Title, *post* § 32.) 'A petition duly verified bearing date, &c. having this day been presented in behalf of ——, and a motion thereon made, *ex parte*, by the said —— in proper person, *or* by ——, of counsel for said petitioner, and the affidavits and documents accompanying the same, together with the said petition being read, and duly considered: It is ordered that —— the defendants *or* respondents named in said petition, upon being served with a copy of said petition, affidavits and notice of motion, together with this order(*e*) for the usual time, show cause before the (*Vice*) Chancellor (*of*, *&c.*) on the —— day of —— at the *capitol* in *the city of Albany*, [§ 15.] why the motion, *or* the prayer of the said petition should not be granted, *or* why the proceedings in this cause should not be stayed, *or* why an injunction should not be granted, and a receiver be appointed as prayed for in the said petition.

(*b*) 7 Cow. 419.
(*c*) See as to substituted service of petitions, &c. 1 Buck. B. C. 200. 38. 358. 3 Madd. 23 279. 4 Madd. 462. 2 T. & V. Pr. 229. c. Ord. Canc. Bea. 169 Dick. 116. 1 Jac. & W, 643.
(*d*) See 1 Cowen 197.
(*e*) In Supreme Court, an order to stay proceedings though served, is inoperative unless accompanied by notice of the motion. 5 Cow. 438.

CHAP. II.

And it appearing that the said —— is absent from the state, *or* that personal service thereof cannot be made upon the said —— it is further ordered that service at his last place of abode in ——, on one of the members of his family, *or* on —— of —— the agent of the said —— be substituted for such personal service. It is also ordered that in the mean time, and until the further order of the court, (all proceedings on the part of the said —— under an order *or* decree of this court of the —— day of —— last in the above entitled cause, be stayed,' *or* 'that it be forthwith referred to a master to receive nominations from, &c. for appointment of receiver, &c.(*f*) *or* that upon executing the security required by the Revised Statutes in such case made and provided, a temporary injunction issue out of and under the seal, &c. directed, &c. enjoining, &c.) and that the question of costs of this application be reserved [See post § 17. affidavit of service; see § 32. for order of dismissal on showing cause pursuant to an order nisi, *or* order absolute for appointment of receiver against a bank.]

2. *Ex Parte Order Nisi, to Discharge an Ex Parte Order Absolute.*

If the petition be presented ex parte, as where no personal or substituted service can be made, the order, will be subject to be discharged on good cause. [vol. I. p. 24.] (Caption and Title, *post* § 32.) 'A petition of the complainant bearing date, &c. with accompanying documents being presented *ex parte*, in order to obtain a discharge of an order granted *ex parte* to the defendants on the —— day of —— instant, and the same being read and filed, It is ordered that the defendants show cause on ——, the —— instant at ——o'clock in the forenoon at the *Capitol* in the City of *Albany*, why the said order should not be discharged, and that the papers on each side on file may be used by either side on showing cause. And, it is further ordered that a copy of this order be served on the defendant's Solicitor as soon as possible, to the end that he may have at least —— days notice of this order exclusive of the day of showing cause as aforesaid.

(*f*) See 1 Paige 86.

§ 13. Vol 1. p. 25. Service on Solicitor or agent. Notice of the death of an agent.

In serving a paper, every thing should be done which ordinary diligence requires, to bring a knowledge of it home to the Solicitor in proper season. Service in the city of New-York, it has been held by the Supreme Court, should be within office hours, which do not commence before 9 A. M. Hence, affixing a paper over the door of the office before that time, the office being locked, was held not to be good service, or do away the effect of a rule for default entered by the attorney in his way to his office, before he actually received the notice so affixed. On finding him and his clerk absent, the obvious course was to search for him at his residence.(*a*) And the service, where the attorney is absent from his office, leaving no one there, should be on some one where he boards, and not at the house in which his office is, if it be in a dwelling house.(*b*) But service on a partner, a Solicitor of the court, though out of, and at a distance from the office, it seems would be good service.(*c*) Notice served by putting it under the door, or in *the office of an agent*, has been held insufficient. It should be delivered to him or his clerk, or one of his family.(*d*) Agents should be appointed in every circuit. But if not, or in case of the death or removal of an agent, it is deemed an act of professional courtesy to give notice of the fact to the adverse Solicitor. 'To———, Esq.: Sir, Your former agent in the Court of Chancery being dead, and no new one having been appointed by you, I have affixed a notice, of which the above is a copy, in the office of the Assistant Register of this court, (*or* Clerk of the —— circuit,) and in order to prevent surprise, herewith send you a copy of the same. Your's, &c.'

3. INTERMEDIATE TO HEARING.

§ 14. Vol. 1. p. 26, 27. No. 1. Notice of presenting petition, and of the motion thereon. *Motions.* No. 2. Notice

No. 1. *Notice of presenting Petition and of Motion.*

If the petition be entitled, [§ 5. 7. and post § 32.] prefix the title to the notice, unless it be endorsed on the back of the petition, and under its title. 'Take notice, (*or* you and each of you will please to take notice,) that a petition, with a copy whereof you are herewith

(*a*) 6 Cow. 63 See farther 2 Johns. Dig. 255.
(*b*) 2 Cowen 484,
(*c*) See (Sup. Ct.) 7 Cow. 416.
(*d*) 2 Wend. 626.

CHAP. II.
of special motion.
No. 3. Notice of countermand.

served, will be presented to R. H. W. the Chancellor of the state of New-York, at the capitol in the city of Albany, on [see notes to No. 2.] the first (*or* third) Tuesday of —— instant, *or* next *or* on the first Monday of the next stated term of —— of this court, *or* on Monday the —— instant, in the present stated term of the court now held at, &c. [§ 15. post, and Vol. I.] (*or* to O. E. the Vice Chancellor of the first circuit at the City Hall of the city of New-York, on the second (*or* fourth) Tuesday of ——, or to J. V. the Vice Chancellor of the third circuit at the capitol in the city of Albany, *or* to A. G. Vice Chancellor of the *eighth* circuit, at his dwelling house, *or* office, *or* place appointed by him in the town of —— county of ——) at ten of the clock in the forenoon of that day, (*or, if in term*, on the opening of the court on that day,) or so soon after as counsel can be heard: when and where an order will be moved for pursuant to the prayer of the said petition Dated, N. Y. this —— day of ——, 1830. Your's &c. (Signed) J. I. R. Solicitor for petitioner. (Addressed) To S. T. and J. T. tenants in possession of the premises mentioned in said petition; *or*, To T. C. W., Esq., Solicitor for defendant, S. S. G. Esq. agent of said ——. If *endorsed on the copy of the petition, the notice* may be: 'Sir, Please to take notice, that a petition, of which the within is a copy, will be presented to —— (as before) when a motion will be made pursuant to the prayer thereof. Albany, Jan. 1, 1830. Yours, &c.' If a draft order or draft minutes of the order sought is drawn and annexed, [ch. 2. § 9. ch 9. § 20.] the notice may be: (Title) 'Take notice, that on, &c. [as before] I shall present to the (*Vice*) Chancellor (*of*, &c.) at a Court of Chancery to be held in and for the state of New-York, *or* in and for the —— circuit, before the (*Vice*) Chancellor of (*the said —— circuit of*) the state of New York, at the *Capitol* in, &c. (as before) a petition with its accompanying documents, of which the annexed are true copies, and at the same time move that the prayer of the petition be granted, agreeably to the draft minutes or order, of which a copy is also herewith served, *or* at the same time move for an order for the resale of two certain lots of ground described in the draft minutes or order, of which a copy is herewith served upon you, *or* for an order to be granted and entered in conformity to

the draft minutes thereof, with a copy of which you are also served, *or* for such other or further order as the court shall direct. [See note to No. 2.] Dated at, &c. on, &c. (Signed) ——, Solicitor for ——. (Address.) To ——, Solicitor for the defendant —— and wife.

MOTIONS.

Motions.

Motions, as already observed, [ante p. 18. and vol. 1. p. 26.] are of course, or special. The occasions for these motions will be noticed as they occur.

On *motions of course* the court hears no opposition; the order is granted on the bare representation or suggestion of counsel without notice, and if obtained on a false suggestion, or misrepresentation, the opposite party may apply by motion upon notice to discharge the same for irregularity; and there is no other manner of trying the irregularity, or impropriety of the order complained of.(*m*) Those motions of course, which are here the foundation of the common orders, or orders of course, [post. § 28.] are never actually made in court. The order is entered by the register, &c. as 'on motion of,' &c. but it is done on a draft order, written request or suggestion, and at the peril of the party. We have on such occasions no 'short brief, usually termed a motion paper,' as in the English practice. But *special motions*, having for their object some application, which, by the rules of the court, the adverse party may oppose, can therefore only be made after notice in writing served upon that party, who has thereby an opportunity of appearing, and opposing it. [§ 10.] It is supported by affidavits verifying the *material* facts of the case, as shown by the documents relating to it, and by any other circumstances connected with it.(*n*) Matters not inconsistent, but connected with, and depending on each other, may be made by one motion.(*o*) But the court will not on motion make an order which will decide the *merits* of a cause,(*p*) though motions may be made which will have the *effect* of terminating the dispute [ante. p. 18.] The merits are not to be discussed on motion.(*q*)

(*m*) 2 T. & V. Pr. 171. c. 3 Atk. 583. [*post* § 22.]

(*n*) 1 Grant, 143-4. 2d ed.

(*o*) Firkins v. Lowe, 13 Price 193. *Example*: application that newly discovered documents be produced to aid defence, &c. and that publication be again enlarged.

(*p*) 3 Bro. C. C. 366.

(*q*) 13 Price 316. 322. nor can objections to the frame of a *bill* be considered, but must be raised by demurrer. Ib. but otherwise it seems as to petitions. *Post*. § 16-24.

CHAP. II.

And in general it is irregular to argue any *point* in the cause, but it has been permitted.(*r*)

2. *Notice* (*a*) *of Motion.*

[Title, § 5. 7. *post* § 32.] Take notice: a motion will be made in behalf of ——, to the (*Vice*) Chancellor (of the —— circuit) (*b*) on the first Monday of(*c*) —— the next stated term to be held at, &c. on, &c. [see No. 1.] *or* at the next regular motion day to be held at, &c. on, &c. (*as in* No. 1. at —— o'clock in the forenoon, *or* on the opening of the court on that day, (see No. 1.) *or* as soon after as counsel can be heard,(*d*) for an order in the above cause, that, &c.(*e*) or for such other or further order, as the court may think meet to grant in the premises,(*f*) together with costs of the present application:(*g*) Which motion will be founded upon the affidavit, (*or* upon the certificate of ——, *or* upon the bill, *or*

(*r*) 1 Ves. jr. p. 252.

(*a*) On the same principle in equity which makes that notice which is sufficient to put a purchaser or party on inquiry, (4 Cow. 717. 1 Page 461.) a notice of motion is deemed sufficient, where it does not mislead. (4 Cow. 51.) and the court will look to the face of the notice, and other circumstances to see whether the opposite party was in fact misled by a mistake. (4 Cow. 60.)

(*b*) 2 Ves. & B. 419.

(*c*) If the *next* stated term, or *next* regular motion day be right, a mistake in the *day* it *seems*, would de disregarded. See 1 Swanst. 10. 1 Cow. 230. 4 Cow. 60. 51. see ante.(*a*)

(*d*) See 5 Cow. 23.

(*e*) Every thing intended to be moved for should be expressed in the notice, for the order will not ordinarly be extended beyond. Where notice was merely that plaintiffs might be put into possession and a receiver appointed: The court refused to order that nothing should be received by defendant meantime, though he did not appear. Where a notice is to discharge an order for irregularity, costs are not given unless mentioned in the notice of motion, and then the motion is made at the peril of costs. (2 T. & V. Pr. 172. 1. Grant, 2d ed. Prac. Reg. Wy. Ed. 287. 5 Madd. 147. 18 Ves. 297. 1 Caines 152.)

(*f*). This should be inserted in every notice where the nature of the relief to be granted is in the least doubtful: for, although the specific rule sought may be refused, yet another may then be granted, adapted to the case made upon the affidavits on both sides. Whereas, if the notice stop, with seeking a particular rule, it is doubtful whether any other can be made, if objected to for the narrowness of the notice. (1 Cowen 135. n. (1.) for we have seen (*ante.* n. (*e*) that in general the order will not be extended beyond the notice.

(*g*) If costs of the application are asked it must be named. (1 Grant, 2d ed.

answer) with a copy of which you are herewith served (*or* copies of which are hereunto prefixed *or* annexed.) Dated, &c. J. C. H. Solicitor(*h*) for —— the ——. To W. S. Solicitor for —— the ——

3. *Notice of Countermand.*

[Title.] Take notice, that I countermand the notice of motion in the above cause *or* matter, with which you was served on the —— instant.(*a*) Dated, &c. (Signed and addressed.)

Motion Days and Terms.

§ 15. Vol. 1 p. 27. Stated terms of Vice Chancellors. See the motion days vol. 1. p. 27.

Vice Chancellors' Terms.(*b*)

1st Circuit: *Fourth Monday* in March; *Second Mondays* in June and October, and *Third Monday* of December—at the City Hall of the city of New-York.

2d Circuit: *Fourth Tuesday* of March; *First Tuesdays of* September and November—at the Court House in Poughkeepsie, and *First Tuesday* of May at the Academy in Newburgh.(*c*)

3d Circuit: *Last Monday* in February, and *Third Mondays* in May, August and November—at the Capitol in the City of Albany.

4th Circuit: *Second Tuesday* of January, 1830; *Fourth Monday* in January, 1831—at the Court House in Plattsburgh; *Last Mondays* of April and October—at the Court House Sandy Hill; *Last Monday* in July—at the Court House at Ballston Spa.

5th Circuit: *First Monday* in March, *Fourth Monday* in July, *First Mondays* in September and December—at the Court Room in the town of Utica.

(*h*) The notice must be signed by the Solicitor, or at least with his name by an authorised, and acting clerk. (Grant.) Notices of motion in *pauper* causes must be signed by the officer of the court, assigned to prosecute or defend for the pauper. (17 Ves. 387

(*a*) On countermanding *notice of trial of a cause*, the defendant is entitled to costs actually incurred previously to the countermand. (2 R. S. 618.) A party could formerly, (by the English practice) give and abandon three notices of motions without paying costs—. But (by a general order costs now are payable for not moving according to notice. (2 T. & V Pr 173. c. 8 Ves. 316. Prac. Reg. Wy. Ed. 288. 1 Swanst. 120.) Nor can motion be renewed till costs of former notice of motion are paid, (1 Wils. Ch. R. 1.) and motion for costs under this order should be made on the next motion day for which the notice of motion was given. (2 Madd. Ch. 214.)

(*b*) As to the list of Counties in each Circuit (See Vol. 1. p 9.) and list of Vice Chancellors (Vol. 1. p. 11. and *ante* p 12)

(*c*) A *special term* in the present year 1830, was ordered for 1st. Monday in February, at Court House in Poughkeepsie.

CHAP. II.

6th CIRCUIT :(*d*) *Fourth Monday* after the *fourth Monday* in May and *Second Monday* in December, 1830; and after that year, the *Third Monday* in December in each year—at the Court House in the Village of Ithica, Tompkins County; and *Fourth Monday* in March, and *Last Monday* in August—at the Court House in Cooperstown, Otsego County.

7th CIRCUIT: *First Tuesdays* in May, November, and February; *Fourth Tuesday* in July—at the Court House in Auburn, Cayuga County.(*e*)

8th CIRCUIT: *Tuesday next before the First Monday* in April—at the Court House in Batavia; *Third Monday* in May; *Fourth Mondays* in August and November—at the Court House in Rochester.

Though the motion days are fixed, [vol. 1 p. 27.] yet, in pressing cases the court often gives leave to move, on an appointed day, at the instance of counsel.(*a*)

§ 16. Presenting, and adjourning, in what cases the petition or motion adjourned. Cross-motions and petitions. Feigned issue &c. No. 1. Special order for adjournment. 2 Common form.

If it be strictly an *ex parte* petition, no other party being interested but the petitioner, and therefore no notice to be given, still, it must be *heard*, by being opened and explained to the court by counsel. Or if it be not *ex parte* strictly, but an amicable matter, or one wherein one Solicitor only is employed for all parties concerned, the same course as to *hearing* must be taken, and then there are counsel on each side, one perhaps for the purpose of consenting only.(*b*) Petitions, though addressed to the Chancellor, were required to be presented to a Vice Chancellor, if they related to a cause or matter within his jurisdiction.(*d*) [vol 1. p. 38.] But this law has been

(*d*) (A *special term* was ordered in the present year for the first Tuesday of March at the Court House, Cooperstown at 10 A.M.) The Circuit Judge of the 6th Circuit is authorised (by act March 26 1830. Session 53. ch. 94. p. 93.) to alter the Chancery terms as then fixed in his Circuit, and when so fixed, they are to remain unaltered for two years from the first of January 1831. Any further alterations must be regulated by section 5. tit 4. ch 4. p. 3. of R. S. Notice of such alteration to be given in the manner required by 8th, 9th and 10th sections.

(*e*) A special term was ordered in the present year 1830, at Court House Onondaga.

(*a*) Grant; but see *ante* § 12.

(*b*) Grant 148.

(*d*) 2 R. S. 477. § 54

recently repealed,(n) and petitions, as well as bills, may in the first instance be presented to the Chancellor, (who will exercise his right of referring them to a Vice Chancellor, see *ante* p. 10-11) or to a Vice Chancellor having jurisdiction. And when the petition (or bill) is presented to a Vice Chancellor, the same, and all subsequent proceedings while the cause remains before him, must be filed with the clerk of the court in his circuit; or if presented to the Vice Chancellor of the Third Circuit, with the Register; if of the First, with the Assistant Register.(o)

When presented, a *copy* of the petition must accompany it for the Chancellor's, or Vice Chancellor's perusal, and use in court (p) Where a party has an objection of form to the petition he must also be prepared to answer the merits, if the objection be overruled. And the court gave time to file affidavits in answer, only on paying the costs of the petition standing over to be taxed by the master, as the parties disagreed.(q) Where the opposite party seeks more than merely to defeat the motion, he should make a cross motion;(r) both the original and cross motion, as well cross petitions,(s) or cross bills, may be directed to be heard together, and an adjournment may be granted for that purpose. But an application to take a petition out of its turn is not heard, unless notice of the intention to make such application be given to the other side.(t) If the affidavit of another be required to resist a motion, and the person refuses to make such affidavit, the Supreme Court have held that they had no power to compel, and that motions were made, or opposed upon voluntary affidavits. The only means in such case it seems to coerce evidence on motions, is to apply for a feigned issue, on trial of which the witness may be compelled to attend upon subpœna.(u) For this purpose an adjournment may also be given. So, also, a trial at law may be directed, but parties will not be put to that ex-

(n) Act to repeal (certain sections of) Revised Statutes, March 11, 1830, 53d sess. ch. 76. p. 81.
(o) Act to repeal, &c. R. S. Mar. 11, 1830, 53 sess. ch 76. p 81. Sections 54 and 55. of 2 R. S. 177. are repealed as above. See *ante* vol 1. p. 38.
(p) Grant.
(q) 2 Madd. 261.
(r) As to cross motions in Sup. Ct. see 5 Cow. 14.
(s) 3 Russel 91.
(t) 1 Gl. & J. (B C.) 182.
(u) 7 Cow. 516, 517. n.

CHAP. II.

pense (unless both parties agree that it *must* be necessary) until after all the evidence is read, and the case fully argued.(*b*) Where a petition to supersede a commission in bankruptcy in England is ordered to stand over until after a trial at law, the practice is, upon application by the respondents, to have it put in the paper, and no petition is necessary for further directions.(*c*) An adjournment may also be applied for in order to give the applicants an opportunity of replying to affidavits.(*d*) But though supplemental affidavits in support of a motion may be made, yet they must (according to Supreme Court practice) be served the same length of time before the day mentioned in the notice of motion, as required for service of the original affidavit.(*e*) A petition may be allowed to be amended, and for that purpose be directed to stand over.(*f*) Thus, on paying the costs of the day, a petition was allowed to be amended by substituting the principal for the agent, in whose name the petition had been preferred.(*g*) If the cause be noticed, and not continued, or adjourned, [see vol. 1. p. 28-9.] the notice must be renewed. One notice of motion cannot be made to carry a cause over from time to time.(*a*) The application for adjournment may be on special motion [but see *ante* p. 17, 18.] supported by affidavit. The party moving may read an affidavit filed at any time.(*b*)

No. 1. *Special Order for Adjournment.*

1. (*Caption* and *Title: post* § 32.) 'On reading and filing the petition of complainant, and the affidavit of P. R. his Solicitor, annexed together with notice of presenting the same, and affidavit of service thereof, and on reading, and filing the affidavit of J. B. Solicitor for the defendant in opposition to the motion, and on motion of Mr. P. R. Solicitor for the complainant, and on due consideration of the case, and in as much as it appears ad-

(*b*) 1 Buck. B. C. 441. see ib. 420.
(*c*) Ex parte Window, 2 Gl. & J. 337.
(*d*) 1 Buck. (B. C.) 232. But the application in England, in cases of bankruptcy, must be two days prior to the petition appearing in the paper, ib.
(*e*) 6 Cow. 576. see 2. R. S. 538.
(*f*) 1 Gl. and Jam. (B. C.) 19.
(*g*) 2 Rose 366. Order to amend within a month's time, means a *lunar* month (2 Sim. & Stu. 476.)
(*a*) see also in Sup. Ct. 5 Cow. 23.
(*b*) 1 Buck. (B. C.) 549.

visable under the peculiar and embarrassed circumstances of this case to reserve all questions of practice, and of costs involved in the application until the exceptions to the Master's report now on file under one of the orders of this court complained of in the said petition, and already set down for hearing under that order, can be brought to a hearing: *It is thereupon Ordered*, that the further consideration of this motion be postponed until the first day of the next term, to the end that the hearing of the exceptions to the Master's report may be brought on, and the same considered in connection with the motion.'

2. *Common form of order:* (Caption and Title.) 'On reading and filing notice of a motion grounded on, &c. for, &c., and affidavit of service, &c., and on M. H. being about to open the same; It is ordered by the court that the further hearing of the said motion be postponed until —— next at *nine* o'clock in the forenoon at the *capitol* in the *city of Albany*, then and there to be renewed, and heard,' *or* 'that the matter of the petition, do stand adjourned to the next day of motions, and petitions.'

PREPARATIONS FOR HEARING.

§ 17.

Vol. 1. p. 22. Preparations for hearing: copies, points, abstracts. No. 1. Brief for petitioner or party moving. 2. Do. for opposing party. 3. Affidavits of service. 4. Admission of service

The preparatory steps before actual hearing are the brief, affidavit of service, copy of petition for the use of the court, [ante p. 45.] points also, and perhaps an abstract of the facts, where the papers on the motion are prolix, and the facts numerous and complicated. An abstract in such cases might perhaps be considered a necessary, and therefore taxable service. It would certainly, as has been suggested in another court,(*a*) 'facilitate, and expedite the right understanding and decision of the motion, and save the court much labor, if counsel, in addition to points and authorities, furnish an abstract of the facts of the case according to their understanding of them, that is, such a sketch or outline as every gentleman would naturally form for his own use in the progress of his examination as counsel. It would give the court a birds-eye view which they could fill up, and correct from the body of the papers, while it would not in general add much to the la-

(*a*) Sup. Ct. 5 Cow. 294.

CHAP. II.

bors of counsel.' The brief itself might often supply materials for such an abstract.

No. 1. *Brief for Petitioner, or Moving Party.*

The brief in ordinary cases of non-contested petitions and motions, is simply the title of the cause or matter, a suggestion of the object of the motion, the time and place when and where, and the Chancellor or the Vice Chancellor before whom the motion will be made. The suggestion or instruction from the Solicitor to the counsel varies according to the application: as, 'To move upon the annexed petition, affidavit, and certificate of counsel, for an order to prosecute as a poor person.' [post ch. 3. § 8, 9.] If the application be attended with special circumstances, a general explanatory statement of them may be given in reference to the accompanying documentary proof. So if the application be intricate, and involve contested points, a statement of the case may be drawn out, consisting of an abbreviation of the petition affidavits, (*or* bill, answer, proofs, &c.) exhibiting the grounds or points contended for in support of the draft minutes or decree sought, and anticipating and answering the objections which may possibly be raised to the application. [See, for instance, a brief on motion to dissolve injunction, *post* ch. 8. § 50.] The brief must accord with the occasion. If it be an occasion wherein any proceedings, whether bill filed, answers put in, affidavits sworn, &c. have been had before in the cause, those proceedings must be stated, and all circumstances and matters of evidence, and explanatory or argumentative observations added, as may to the Solicitor appear most conducive to his counsel's and the court's clear comprehension of the case. In some cases particularly, there may be numerous affidavits on each side, which must all be briefed, and form an essential part of the brief. Sometimes by way of saving time and expense of office copies, (in England,) Solicitors will interchange copies of the affidavits made on each side as soon as prepared. These *affidavits* therefore *briefed*, are to be annexed to the brief, or rather should form part of it, and precede the observations. The notice of motion, that is, the copy of it, should also be annexed to the brief in front. On these occasions, sometimes of

magnitude, the same circumstances are to be attended to in having previous consultations with counsel, when deemed advisable, and being furnished with all necessary papers and documents on the motion being heard, as on the hearing of a cause.(*a*)

The brief for ordinary purposes is comprised within a half or quarter sheet folded lengthwise. This 'short brief for ordinary applications' is termed in the English practice the 'motion paper' and after the motion is (in England) delivered to the 'Registrar' for information in drawing up the order. The title and instructions are put inside, the title and general suggestion on the outer side. The title inside consists either of the whole title of the cause, if not a long title, and so comprising the names of all the parties; or if numerous, then only the first of the plaintiffs, and also that plaintiff for whom the application is made, (if for a plaintiff) adding, '*and others*,' or if the applicant be not one of the plaintiffs, but defendant, then the first plaintiff only, wtih the addition of '*and others*;' and so as to defendants if numerous; and the same if applicant be not either plaintiff or defendant. But in all cases the names of the *parties applying* must appear (when parties to the suit) in the title of the cause in the inside of the motion paper or (as it is endorsed) '*brief*;' on the *endorsement* of it also the same must appear; some motions (either when one solicitor is concerned for all sides, or when parties are amicable, or otherwise concerning) are *consented* to, and the orders thereon termed *consent orders*, and the briefs given to counsel, instructing them to consent to the application, termed *consent briefs*. The consent brief should express particularly for what party, and to what extent, the consent is to be given.(*b*) The instructions in the brief are of course indefinite. For example, 'to move to amend by adding defendants without costs as to the present defendants requiring no further answer from them, and amending their copies': *or* to move for leave to amend the complaint's bill filed herein.' (Suggestion.) 'Defendants have called for a replication.' If rather a *special* matter, the instructions inside of the brief are more in extenso:

(*a*) Grant, 2d ed. (*b*) 1 Grant 143. 2d ed.

CHAP. II.

viz. 'A. B. & F. his wife and others v. C. D. and others.' This is a suit instituted by complainant against his mother for an account of the assets of his late father, and for payment of his share of legacies given to his deceased brother. Previous to the filing of this bill, the complainant had assigned all his interest under the will of his late father to Messrs. T. and C., his agents, as a security for money advanced by them to the plaintiff. Subsequent to this assignment, and before the filing of the bill also, complainant was discharged under an insolvent act from the prison for the county of ——, and he has twice been discharged under different insolvent acts since the filing of the bill; so that it will be necessary to amend the complainant's bill, which please to move for leave to do.'(c)

The brief being folded, is *indorsed* as in this form,

A short Brief for Special Motions:

In Chancery:

Before the (Vice) Chancellor, &c.

M ——— vs. P ——— } Brief for Compl't or Defend't.

Motion day, the ———, ———, at ———.

To move upon the Certificate of J. W., Esquire, the Master, dated ———, for a Commission to examine witnesses, upon the usual terms.

A. B. Solicitor.

N. Y. —, 1830.

G. G. Esq. (Counsel.)

(c) 1 Grant (2d ed.) 143. 149. 2 ib. 346-6.

No. 2. *Brief for opposing Party.*

The brief for defendant may also comprise an abbreviated statement or abstract of the case as presented in the petition, affidavit, notice of motion, &c., and in the affidavits, &c. offered in opposition. The suggestion, or instructions 'to oppose' may be first *in limine*, and secondly to the *substance* of the petition, or motion, [post. No. 2.] and if an order or decree be sought differing from that proposed, and served, the minutes, or draft of such order may be prepared, and submitted.

No. 3. *Counsel's Brief in Extenso.*

The brief, if drawn out by the Counsel, will exhibit the skeleton of the case, and his argument founded on the short brief, instructions, and suggestions of the Solicitor, and his own researches, and reflections, as exemplified in the following '*Brief for complainant in opposition to the petition of defendant to open a decree by default at hearing*. The outer side of the brief is endorsed as directed, with the title, &c. and the general suggestion. 'To oppose motion grounded on petition to open a decree,' &c. The inside of the brief embraces, 1. The title. 2. The case, or statement of facts. 3. The points, arguments, and authorities. 1. In Chancery, R. S. exe'x of A. S. vs. J. S., W. S. and M his wife. 2. From the affidavit, certificate, and admission of Counsel now offered in opposition to this motion, it appears that the suit was regularly brought to a hearing, after proofs closed, and a decree taken for complainant by default. The defendant's Solicitor J. A. had attended the examination, and the claim of the defendant was never proved, or insisted upon. The petition, copy of which with notice is annexed, is signed by M. S. without signature, or any apparent authority of her husband. It is not signed by Solicitor, nor addressed to any. The notice was served, on the —— instant. The petition had been presented at the close of the last term, and the Chancellor endorsed on it a permission to apply to him at Albany on due notice to be given thereof. The petition seeks to open the decree, and for examination of proof in support of defendant's answer setting up an anti-nuptial contract, &c. No excuse for the default is offered other than that petitioner 'finds that from the

CHAP. II.

situation, and unfortunate habits of her husband, he has neglected to defend the suit.'

3. Considering the claim of the defendant to the mortgage money unfounded, and made in bad faith, every fair resistance that can be offered to such claim, and in favor of that of the complainant, who is a widow, may be made without the imputation of captiousness in practice: therefore, object *in limine*: *First*, that due notice has not been given. Due notice must intend that notice which is required by the practice of the court, and there is no reason why, in this instance, it should be dispensed with. The notice, with a copy of the petition, ought to have been served as early as the —— instant, in order to give the eight days required by rule of court 89; the party being in New-York, and the motion to be in Albany. According to the period of service, the time expired on Suday, and by rule 122, the whole of Monday (the notice being for the first Monday in term) must be included; consequently, the motion cannot be made on that day agreeably to the notice. The petition and notice might have been copied, and served within an hour after the Chancellor returned them to the Solicitor for the petitioner, and yet he delayed until he supposed perhaps the last moment had arrived before he gave the copies. The notice is therefore out of time, and is besides irregular, inasmuch as it is not signed by the Solicitor for the defendants S. and wife, nor any reason assigned why it was not, and it is not directed to the Solicitor for the complainant. *Second preliminary objection*: The petition is made, and signed by M. S. alone, a married woman, and her husband a co-defendant. She cannot therefore act as a separate party from her husband without the special order of this court upon a proper application for that purpose. The petition does not appear to be sanctioned by the husband, and the wife cannot in this way interfere with a suit, the management of which belongs exclusively to him. To illustrate the force of this objection: the resisting of the petition is attended with costs on the part of the complainant, who if successful is entitled to costs, and yet, who is to pay them? The husband who is not a party to the petition cannot be ordered to pay costs for the act of his wife, which it does not appear

he ever authorised, and the wife herself cannot surely be ordered to pay them. 2. *Objections to the matter of the petition*: The cause was entrusted to the management of a highly respectable Solicitor and Counsellor of this court, whom no one will suspect of neglecting his duty; indeed, nothing of the kind is suggested. Nor does the petitioner pretend that she, or her husband were ignorant of the proceedings which have been had in the cause. There has been no surprize upon the parties, or their Solicitor and Counsel, and after the progress of this cause, and the circumstances attending the decree as stated in the affidavits of the Solicitor, and of the Counsel for complainant, it is submitted that it ought not now to be opened, unless it is a matter of course to do so whenever it is asked. 2. The material allegations in the petition as to the anti-nuptial contract, and as to the bond, and morgage growing out of the trust-deed to infant S. are negatived by the affidavit of the Solicitor for complainant, and those deeds not having been proved, could not be used on the hearing of this cause, if the decree should be opened. All this matter, however, relates to the merits. Whereas the petition should have been confined to matter of excuse for the default that was taken, and yet it contains not one word on that subject, except indeed a general and indefinite suggestion of the 'unfortunate situation and habits' of the petitioner's husband, in consequence of which she 'now finds' he 'has neglected the suit. She does not state the situation and habits she alludes to, nor venture to say that her husband was during the pendency of this suit, or even now, incompetent to the transaction of business. Much less is it pretended that Mr. A. their Solicitor, has been guilty of any neglect: indeed, in the manner in which he followed every step taken with regard to examining witnesses, and passing publication, showed that he was acting with his accustomed vigilance; nor does Mr. A. complain of the decree, or make a single suggestion to the court, why it should be opened. With regard to Mr. O. one of two things: he was employed as counsel in the cause before the decree was taken, or after. If before, he should have offered some excuse for not attending and arguing it when it was call-

CHAP. II.

ed on the calender; if after, then some reason should be assigned why he was not sooner retained. Neither the one nor the other has been done. 3. If the decree were even opened and a hearing ordered, how could the defendant be in any better situation. The claim set up in their answer rests upon deeds which they have not proved, and the petition therefore prays 'not only to have a hearing in the cause, but to have an opportunity of examining witnesses' to prove the answer. The extravagance of the latter part of this prayer scarcely requires a comment. After the opportunities *that* have been had for examining witnesses the measures taken by their Solicitor to close the testimony and pass publication, the time that has since elapsed, the actual publication and a decree in the cause, it is impossible that this part of the petition can be listened to for a moment. Not the slightest foundation for such a favor is laid, and it cannot be granted without violating the established rules of practice of this court. It is on the whole believed, on the part of the complainant, that she is entitled to hold the decree made in this cause, and to the full benefit of it. [See § 25. No. 4.]

§ 17. Vol. 1. p. 29. Affidavit of service. No. 1. Affidavit of service of copy of petition &c. 2. Affidavit, service of petition, &c. and of order to show cause. 3. Affidavit of service of notice, of motion, affidavits, &c. on the party, solicitor, clerk, law partner, by affixing at the office door, or serv-

There are not many occasions in which it is by *any means advisable* to omit making an affidavit of the service, to produce in court when the motion is made, in case of the opposite party not appearing, so that the motion may not be lost for want of the court's knowing that due notice had been given.

No. 1. *Affidavit of Service, of Petition, &c.*

[Title and Commencement as in § 7. No. 1. &c.) S. V. student at law in the office of D. C. Solicitor for the petitioner, &c. in the above *or* annexed petition named (or if copies be served by different persons, see § 7. No. 3.) being duly sworn (*or* affirmed, &c. see ib. No. 2.) doth depose and say that on the —— day of —— instant, *or* last past *or* in the year one thousand, &c. he personally served upon the above named —— of ——, *grocer*, and —— of ——, ——, the preceding *or* annexed petition, affidavit and notice by delivering to each of them, true copies thereof (*or* if served on a Solicitor or his clerk, see post No. 2 and 3.) sworn &c. [see jurat § 8.]

ing at the dwelling house, or on an agent, or by affixing.
4. do. setting out the substance of the notice.
5. Admission of service.

2. *Affidavit of Do. and of Service of Order to Show Cause.* [*ante* § 12.]

[Title and Commencement, see § 7.] —— that he this deponent did on, &c. at —— o'clock in the —— noon of that day (where the hour is important,) personally serve —— the party defendant *or* —— the Solicitor for —— the complainant [see description of parties § 7. Affidavit, No. 1.] in this cause as this deponent (*if he be a stranger to the parties*) is credibly informed and verily believes,(*b*) *or* (if served on a clerk) did leave at the office of —— with his clerk there [see No. 3 post] true copies of the above, *or* annexed petition, affidavit, and of the original order to show cause also annexed, *or* certified copy of the original order duly entered in the office of (*Assistant*) Register, *or* clerk of the —— circuit of this court, annexed to, (*or* subjoined, *or* endorsed on) the said petition; and at the same time he so served the said copies, he this deponent showed to the said —— the said original order, *or* certified copy of said original order, [see § 35.] so entered.(*c*)

3. *Affidavit of Service of Notice.*

[Title and Commencement as in § 7.] —— and saith that he did on the —— day of —— instant, *or* last past, *or* in the year, &c. serve by delivering to a clerk in the office(*d*) of ——, Solicitor for (—— one of) the *defendants* in this cause true copies of the annexed *or* above notice and affidavit he the said ——, being at the time of said service absent from his office:(*e*) *or* that he did on, &c. serve ——, Solicitor for the *complainant* with a notice of which the annexed is a true copy, by de-

(*b*) 1 Grant 140. T. & V. Pr. 5. Harr. Sed. vid. 1 Ves. Jr. 141. The deponent should first take care to obtain such information.

(*c*) 19 Ves. 380.

(*d*) See ante p. 39. The name of the Solicitor, but not of his clerk, is necessary in analogy to the affidavit of service by the English practice, which must name the party's clerk in court, though not that of his agent or writing-clerk. (See authorities to note.(*b*) *Affidavits of Service*, of papers stating, the paperswere served on the attorney by delivering the same to a clerk in his office, without stating that the attorney was *absent from home*, or *absent from his office*, is good, service on clerk while in the office is sufficient, whether the attorney be there or not, (1 Cowen, 215.) except when the service is to be personal (see ib. 215,) ante § 13. *post* § 33.

(*e*) This, it seems, is unnecessary. See last note.

CHAP. II.

livering the same to him personally, *or* that he personally served on —— Esquire, who appeared in proper person in the above cause, and who is the Solicitor therein for H L. and A his wife two of the defendants therein, a notice in writing(*f*) of which the annexed is a *duplicate*; (*or* a copy of the original affidavit hereto annexed,) and that on the day and year aforesaid this deponent did personally serve on B. K. Esquire, the law partner [see p. 39.] of J. D. Esquire, who is the Solicitor for S. L. J. L & E. L. three of the above defendants, in their office, and during the absence of the said J. D.(*g*) therefrom another notice in writing, &c. *or* that he this deponent went to the office of —— Solicitor for —— situate in —— for the purpose of serving the notice, &c. hereunto annexed, and finding the office locked, *or* the door fastened, and no one there on whom effectual service could be made, he this deponent made diligent enquiry to ascertain the place of residence of the said —— (by applying for information to persons residing *or* transacting business in the same, *or* adjoining building, *or* in the neighbourhood, and at the post office in said ——, and examining the city Directory, and also applying to —— who was then preparing a new Directory for the current year,) but not being able to learn where the said —— resided or could be found, he this deponent on the same day, and within office hours [see p. 39] to wit, at —— of the clock in the —— noon of that day, affixed on said office door (*or* put into the window, *or* thrust through an aperture in *or* under the door of said office) a true copy of said notice, &c. hereto annexed, addressed to the said —— as Solicitor aforesaid; *or* that not finding the said Solicitor or any person at his office on whom service could be made, he this deponent went to the dwelling house (boarding house or place of abode) of the said —— situate in —— and on inquiry finding that he was thence also absent, he this deponent served the said notice, &c. by delivering a true copy of the same to the wife, *or* a woman-

(*f*) Where the original is served, and a copy kept, or where the substance (as in next form) is given in the affidavit, it should say 'a notice *in writing*' or words to that effect. 19 Ves. 380. (Grant, Harr. T. & V.)

(*g*) If the law partner be also a Solicitor, it seems, the service may be on him out of the office. See ante p. 30. But see *post* § 33.

servant of the said ——, at his dwelling house, *or* place of abode aforesaid, *or* (on some person residing in the house, naming or designating the person) addressed to the said ——, *or* that he served a notice in writing, of which the annexed is a duplicate or copy, on —— the agent of —— the Solicitor for ——, *or* on the clerk in the office of —— agent for, &c. *or* on the wife, &c. of the said —— agent, he the said agent being absent from his office and dwelling house, &c. [see p. 39.] *or* that on enquiring at the office of the (*Assistant*) Register of this court, *or* clerk of —— circuit, after a careful examination in this deponent's presence, *or* by this deponent of the list of agents kept in said office, he this deponent was informed, *or* ascertained that no agent appeared to have been appointed by the said ——, *or* that the agent of the said —— was deceased, and no other had been substituted, he this deponent thereupon affixed the said copy, (*or* notice in writing addressed to the said ——, of which the annexed is a copy *or* duplicate,) in a conspicuous place in the office of the said (*Assistant*) Register of this court, *or* clerk of the —— circuit aforesaid.

4. *Affidavit wherein the Substance, &c. of the Notice is given.*

[Title and commencement, § 7.] ——, and saith, that he did, on ——, serve ——, Solicitor for all the defendants in this cause, (*or* W. K. Solicitor for S. T., and P. A. J. Solicitor for O. P. and W. Y. defendants,) with a notice *in writing*,(*h*) purporting that (*follow the notice exactly*) the (*Vice*) Chancellor (*of*, &c.) would be moved on —— at ——, (see *ante* § 14. p. 30. 49.) or as soon after as counsel could be heard, *or* that a motion would be made to, &c. at, &c. on, &c. that (*state the object of the notice, as*:) 'the said defendants —— and —— might be ordered to transfer to the (*Assistant*) Register (*or* Clerk of the —— circuit) of this court, in trust in this cause, the sum of —— six per cent United States stock, admitted in the answer of the said defendants, to be standing *in the name of their testator* —— in the pleadings in the cause named, in the books of the President, Directors & Co. of the Branch Bank of —, and also the

(*h*) See note (f) to last form.

CHAP. II.

respective sums, &c., likewise admitted by the said defendants to be standing in *their own names* in the books of the said President, Directors and Company of the said the Branch, &c. part of, &c. [*follow the notice*] by delivering to, and leaving with the clerk of the said —— at his office, or by delivering to, and leaving with the said ——, one of the Solicitors aforesaid, and with the clerk of the said ——, at, &c. a true copy or true copies of such notice:(*i*) *or* 'that the defendant, W. C. might be directed to attorn tenant, and pay his rent in arrear, and the growing rent for the farm and lands in his possession, to Mr. J. N. the receiver in this cause,(*j*) by delivering to, and leaving the said notice with, (as before.) Sworn, &c. [See Jurat § 8.] Signed, [See Signature, ante § 5-7.]

5. *Admission of Service.*

Indorse on the original petition notice, &c. 'I admit due service of a copy of the within petition, *or* we admit due service of a notice on us respectively, of which the within is a copy,—Dated, &c., ; *or* we respectively admit due service of a notice, of which the within is a copy. Dated, &c. (signed) C. G., Solicitor for T. B, P. A. J. Solicitor for E. M.'

§ 19. Vol 1 p. 30. Further time, form of an order saving the benefit of a notice to a future day. But see *ante* § 16.

Where the court directs that affidavits shall be filed on both sides within a certain limited time, and some of the affidavits on one side happen not to be filed on that day, it is the established rule of the court (in England) not to enlarge the order farther, that the other side may be required to give answer to those affidavits; for the neglecting party is concluded.(*a*)

No. 1. *Order for saving the Benefit of a Notice of Motion.*

[Title caption and commencement, *post* § 32.] On reading and filing [see p. 47.] a notice signed by —— Solicitor, for ——, and directed to the complainants and defendants, and to —— and ——, that [see notice of motion, p. 42.] he should on this day move this court that the biddings for the lots No. —— and ——, parts of the estates in question in this cause, might be opened,

(*i*) Altered from 2 Grant 5. 2d ed.
(*j*) 2 Turn. and Ven. 61.
(*a*) Harr. 401. 1 Grant. 141. But see *post* § 24.

the said —— undertaking to advance the sum of —— on each bidding, and to pay the costs already incurred by the said —— and ——, on their procuring the Master's report of their being the purchasers of the premises comprised in the said lots, and applying to confirm the same: and on reading and filing the affidavit of —— of due service of said notice, and on motion of ——, of counsel for —— aforesaid: *It is thereupon ordered*, that the benefit of the notice of the said motion be saved to ——, the —— day of —— instant.(*a*)

Exceptions to Petition for Scandal or Impertinence.

§ 29. Vol. 1. p. 30. Exception to petition. affidavit. &c. for scandal or impertinence, See ante § 7.

[Title, *post* § 32.: In Chancery: In the matter of the Petition of, &c.] Exceptions taken by the respondent A. G., who is impleaded as aforesaid to the petition of the above named C. G. *First* Exception: For that so much of the said petition as sets forth and showeth that, &c. is impertinent and scandalous, and not material to the relief prayed for by the said petition. *Second* Exception: For that the statement in the said petition of the said petitioner contained, commencing with the words 'and it,' &c., and ending with the words, 'which sale,' &c. is likewise impertinent, and is immaterial to any relief prayed for in and by the said petition. In all which respects the said defendant C. G. insists that the said petition is irrelevant, impertinent, scandalous and immaterial. Wherefore he excepts thereto, and he humbly prays that the same may be expunged from the said petition.(*b*) (Signed) A. G. in pro. per. D. G. of

(*a*) Slightly altered from 2 Grant. 264. 2d ed. 1829. See *post* ch. 7. § 23. and *ante* Vol. 1 same ch. & §

(*b*) Petitions are referrable for scandal, or impertinence, but there seems to be no instance of a petition of appeal being referred for the latter. (1 Jac. and Wal. 326. 18 Ves. 114.) So affidavit filed in support of a motion is referrable for impertinence, but not if the opposite party has filed any affidavit in opposition to the motion. (2 Russ. 219. ante § 7.) In Supreme Court, costs of motion are not allowed though the party prevails, where the affidavits on which the motion is founded are loaded with irrelevant matter (2 Wend. 631.) The court will in a clear case of scandal expunge the irrelevant matters, and punish parties who misuse its proceedings. Nothing can be scandal that is not at the same time impertinent. (1 Buck. B. C. 132.) In petition to take an affidavit off the file for impertinence, it is sufficient to charge it generally: *Quere*, if the court will refer such matters, or act upon its own view. (2 Gl. & J. (B. C.) 315. But See *ante* § 7.) An order to refer to the master for impertinence not duly pro-

CHAP. II.

§ 21.

Vol 1. p. 30-1. dismissal of petition or motions: appealed motions to Chancellor. Costs of motion, when to be costs in the cause. When costs follow. Interlocutory costs, [but see *post* No. 4. n (*a*)] how collected. No. 1. Power of attorney to demand costs. 2. Affidavit of demand and refusal. 3. Do. when demanded by agent. 4. Order for commitment. 5. Precept for commitment.

Counsel. The practice on the exception being filed and served, is similar to that upon bill [*post* ch. 8. § 15, &c.] or answer. [ch. 8. § 55.]

The petition may be *dismissed with costs*, if set down and no one appear in support of it, and the respondent produce an affidavit of the service.(*a*) So also, where the service on him was short of the required time, he may appear in person, and insist on the irregularity.(*b*) A petition (in England in bankrupt cases) may be dismissed for multifariousness.(*c*) The dismissal is without prejudice to another suit. [*post* § 28. 32.] If the order to dismiss be discharged, [*post* § 23.] a second order to dismiss cannot be obtained on the same day on which the former order to dismiss was discharged, there being no fraction of a day.(*d*) An order for dismissal, if by a Vice Chancellor, may, by an appealed motion to the Chancellor, not to another Vice Chancellor, [ch. 1 § 4-7.] be discharged or varied.(*e*)

The cases where the costs of a motion, in which the court gives no direction as to costs, *become costs in the cause* to the party to whom costs of suit are given upon the hearing, are these: The party making a successful motion is *entitled to his costs, as costs in the cause;* but the party opposing is not. The party making a motion which fails, is not so entitled; but the party opposing it is. Where a motion is made by one party, and not opposed by the other, the costs of both parties are costs in the cause. Whenever, by reason of special circumstances, these rules ought not to apply, the court gives particular directions with respect to the costs; but very rarely gives any such, as to the costs of a motion for the purpose of obtaining, continuing, or dissolving an injunction

ceeded in, is thereby abandoned, and is no objection to an order to dismiss. (3 Swanst. 247. n.)

(*a*) Grant T. & V.

(*b*) 2 Ja. and W. al. 221.

(*c*) Buck. B C. 256.

(*d*) 2 Sim and Stu. 325. See 5 Mad. 60.

(*e*) In England, a motion refused or an order made by the Master of the Rolls or the Vice Chancellor may upon notice, by an *appealed motion* to the Lord Chancellor be re-heard, and the order discharged or varied. but the Vice Chancellor has no jurisdiction to discharge, vary, or alter an order of the Master of the Rolls. 1 Sim. & Stu. 105. 2. T. & V. Pr. 175. See instance of a motion after being refused by the Vice Chancellor, made before the Chancellor. (1 Turn. & Russ. 94.) As to Vice Chancellor's jurisdiction, see also 2 Russ. 153. 158-9. 161. See also 3 Gl. & Jam. 142. 2 ib. 390.

to stay proceedings at law, leaving the costs of such motions to abide the event of the suit.(*f*) We have seen [v. 1. § 21.] that costs of motions dismissed are not costs in the cause. Costs follow the refusal of a motion altogether irregular.(*g*) Costs of a motion not made pursuant to notice will be given.(*h*) A motion before Vice Chancellor for leave to put in a supplemental answer, having been objected to, for that the notice did not specify the particular facts to be introduced, [see p. 42. n. (e) (f)] defendant without doing any thing further thereon, gave notice to plaintiff of a similar motion before the Chancellor specifying such particulars, but did not move pursuant to such notice; and the court held that the plaintiff was entitled to the costs of the two notices of motion.(*i*) Where the court is moved for payment of costs on account of a notice which has been abandoned, such notice of motion must (in England) be mentioned to the court, and produced to the Register before he draws up the order for the costs.(*j*) These costs, must be paid before the party to pay them can renew the motion.(*k*) But unless the costs of a former notice have

(*f*) 1 Sim. & Stu. 357.

(*g*) 13 Price 118. Though where motion is denied, costs in Supreme Court follow of course: (2 Cow. 484.) yet this is merely directory to the clerk. The rule that the motion be denied, must express 'with costs,' and the attorney must see that the clerk enters it correctly; or if not, attachment on motion for non-payment of the costs would be denied, if on producing the rule it appear no costs are expressly given.(4 Cow.358.) Motions, the effect of which may be obtained by private stipulation, are discountenanced, and the costs in such case restricted to the time the offer to stipulate was made. (3 Cow. 15.)

(*h*) 3 Mad. 550. 318. 437. 1 Wils. ch. 1. 1 Swanst 128. In Exchequer, in England, costs are not, on application for the purpose, given for attendance on motion not brought on by the party noticing it, no counsel appearing, and where *one* notice only had been given: but the court, when the motion is finally disposed of, take the prior attendances into consideration and assert a discretionary power in giving directions as to costs. (9 Price 14.) But costs in Exchequer, as well as in Chancery, of former attendance to oppose a motion are given a party attending pursuant to notice, where the party moving came unprepared with proper materials to support his motion.(13 Price 61.)

(*i*) 1 Wils. ch. 1.

(*j*) 3 Madd. 437 But upon application by respondent for costs, the petitioner not appearing, the petitioner's affidavit of service was held sufficient (2 Gl. & J. (*B. C.*) 392.

(*k*) 3 Madd. 550. 1 Wils. ch. 1. A subsequent motion made on affidavits may be refused with costs, because the costs of a prior irregular application (as where no affidavit of the materiality of amendments asked had accompanied the motion,) had not in the mean time been paid. (10 Price 205.

CHAP. II.

been taxed, non payment is not an objection to a subsequent motion.(*l*) So, where a petition had been ordered to stand over, paying the costs of the day, the objection to hearing it on the ground of such costs not having been paid could not, it was held, be admitted without an affidavit of demand having been made.(*m*)

The time within which costs are to be paid, and the mode of enforcing payment have been noticed [Vol. 1. p. 31.] The party should be *ordered* to pay the costs, and costs must be expressed in the order. [p. 61. n. g] It must not, it seems, be in the *alternative*, but absolute. The distinction appears in the analagous practice of the Supreme Court to be this: Where a party is ordered to pay costs, as where his motion, being resisted, is denied *with costs*, and on being *shown* the original order, power of attorney if demanded by power,(*a*) and the taxed bill, a copy of the bill being delivered to him and a demand made, if he refuse or neglect to pay them on an affidavit of these facts, an attachment from that court may issue on motion of course, without notice; as no notice of a motion for attachment for non-payment pursuant to a rule is necessary.(*b*) But where any thing is done upon terms, as when a rule or order is granted for instance to set aside a regular proceeding on payment of costs, the costs must be paid or tendered *instanter*, which means 24 hours; that is, the party obtaining the favour must seek the other, and pay or tender the costs *instanter*, without waiting until a bill is delivered or costs demanded, and for this purpose he should perhaps also get an appointment at once from the taxing officer, to tax the costs, serve a copy on the opposite attorney, and when taxed pay the same without delay. For the rule being 'on payment of costs,' is conditional, and of no force without such payment. The other party may proceed, if not paid, and is not driven to the delay of recovering the costs by attachment. Indeed, it is questionable whether, as the favor is conditional and its acceptance therefore optional, the party obtaining the fa-

(*l*) 6 Madd 68. n.
(*m*) 2 Gl. & J. (*B. C.*) 78.
(*a*) Copies of which or the rule is unnecessary in Sup. Ct. 1 Wend 293. sed vide, 2 Cow. 453. 598.
(*b*) 7 Cow 470. sed vide 2 Cow. 598, 599. n.

vor could be brought into contempt for non-payment.(*d*) The forms of orders in this court where interlocutory costs are given, will appear in their proper places. Obtain from the office in which the order is entered a copy of such order certified as directed, [§ 7.] serve a copy of your bill of costs with notice of taxation as directed. [*post* § 82.] If the time of payment is specified in the original order, await the expiration of that time, if not specified, await twenty days, and if the costs be not paid, serve copies of the certified copy of the order, and taxed bill showing the originals, and the power of attorney, if any; demand payment, and if the costs be not paid *instanter*, prepare an affidavit [§ 7-8.] of the service, *personal* demand and non-payment;(*e*) file the affidavit to which is annexed the certified copy of the order on which the demand was made, the original taxed bill, and power of attorney; obtain the entry of your ex parte order for the commitment of the delinquent party, and thereupon take out and deliver to the sheriff a *precept* to commit the party to prison, in the form approved by the court.(*f*) The precept is in the nature of a peremptory attachment, and the party is not therefore brought up, as in cases of attachments for contempt on motion founded on affidavit when interrogatories are filed on his being brought up or appearing, his answers on oath taken, and contradictory or confirmatory affidavits received.(*g*) If the party be already in prison, and refuse to pay the costs, on being brought up by *habeas corpus*,(*h*) a sequestration may be moved for:(*i*)

(*d*) see 2 Cowen, 598, 599. n.
(*e*) R. 171. 2 R. S. 535. § 4.
(*f*) Rules of court, p. 92. form No. 10. 2 R. S. 535. § 4.
(*g*) 2 R. S. 537. § 19.
(*h*) see ib. 536.
(*i*) A debtor in jail brought up by habeas corpus, and declining to pay a bill of costs, for which an attachment and other process were issued, was committed, and a *certificate* of the warden of the fleet prison, of his being in his custody for contempt for non-payment of costs taxed, was held sufficient to found a motion for a sequestration, without any affidavit of demand and refusal to pay. 11 Price, 473.

CHAP. II.

No. 1. *A Letter of Attorney to Demand Costs.*(m)

In Chancery

Between A. B. Complainant

and

C. D. Defendant.

TO ALL TO WHOM THESE PRESENTS SHALL COME,

A. B. of ——, the complainant above named, sends Greeting:

Whereas by an order made in this court, *or* in the court of Chancery of the state of New-York, before the (*Vice*) Chancellor (*of the —— circuit*) at, &c. on, &c. [see the caption of the order § 32.] a certified or exemplified [§ 7.] copy whereof is hereunto annexed; (or if the party live at a distance refer to the order merely as duly entered in the office of the (*Assistant*) Register *or* Clerk of the —— circuit of said court in the above entitled cause, it was ordered that the said C. D. pay to the said A. B. his costs of opposing a certain motion, *or* it was among other things ordered that a certain motion made in behalf of the said defendant be denied with costs to be paid to the said complainant, *or* that a certain petition in behalf of —— defendant in the above cause theretofore, *or* then and there presented, be dismissed, and the motion thereon made be denied with costs, &c. And whereas the said costs as taxed and certified by the Vice Chancellor (*or* taxing Master) of the —— circuit, amount to —— (as by reference to the taxed bill hereto annexed will appear.) NOW KNOW YE, that I, the said A. B. the complainant before named, have made, ordained, constituted and appointed, and by these presents do make, ordain constitute and appoint —— of ——, and —— of ——, and each of them(n) my good and sufficient attorney and attorneys, jointly or severally for me and in my name personally to demand, and receive of and from the said C. D. the said sum of —— so taxed and certified, as due and owing to me from the said C. D. as aforesaid;

(m) Altered from a form in another case, 2 Grant. 340. see a short form 2 Cowen 454.

(n) One is sufficient, but it may be sometimes prudent to name more.

and on payment thereof, for me and in my name, good and sufficient releases, acquittances, and other discharges for the same to make, seal, execute, and deliver, and all and whatsoever my said attorneys or attorney, or either of them, shall lawfully do, or cause to be done, in the premises, by virtue of these presents, I, the said A. B. do, and will allow, ratify and confirm, to all intents and purposes whatsoever, as fully and effectually as if the same were or was actually done by me, and as I *myself* could or might do in my own proper person. In witness whereof I have hereunto set my hand and affixed my seal at —— this —— day of —— one thousand, &c. (Signed) A. B. [L. S.] Sealed and delivered in presence of E. F. If executed at a distance, let the power be properly acknowledged, or proved by one of the subscribing witnesses, and duly authenticated. The following form of an affidavit to prove the execution of the power may suffice: —— ss. E. F. of ——, ——, being duly sworn, &c. [§ 7.] saith, that on —— he this deponent was present, and did see the letter of attorney hereunto annexed duly signed, sealed, delivered, and executed by A. B. of ——, ——, and that the name A. B. thereunto subscribed is of the hand writing of the said A. B. and the name of E. F. thereunto subscribed as witness thereof, is the hand writing of this deponent, sworn, &c. [§ 8.]

No. 2. *Affidavit of Demand of Costs.*

(Title and Commencement § 7.)——, ss: G. W. S. Solicitor for the complainant in the above cause, (*or* Petitioner *or* respondent in the above entitled matter of petition,) being duly sworn doth depose and say that he did on the —— day of —— now last past personally serve on —— the above named defendant, [*or* respondent *or* petitioner] copies of the papers hereto annexed, that is to say, a copy of the tax bill, [*or* 'copies of the two taxed bills' where there are several causes: But see *ante*] of costs, and a copy of the certified copy of the order in the above cause, at the same time showing to him the said annexed originals, and did at the same time, as the Solicitor for the said ——, demand of him the said

CHAP. II. —— payment of —— the costs contained in the said annexed taxed bill (*or* two annexed taxed bills) of costs. And this deponent further saith, that the said ——, notwithstanding such demand, hath not paid the said costs, *or* that the —— hath hitherto neglected to pay said costs, *or* that the said —— hath hitherto refused and neglected to pay said costs, *or* that the said —— requested time to see his counsel before he gave an answer to the said demand; to which this deponent assented; and this deponent further saith, that afterwards, and on the —— day of —— instant, the said —— called on this deponent, and gave as his answer to the said demand that he could not, at present, pay the said costs, and that he was unable so to do, or words to that effect. (Signed § 7.) sworn, &c.) § 8.)

No. 3. *When Demand is Made by an Agent.*

If the demand be by a clerk or agent, show the authority [*ante* No. 1. and p. 64.] to receive the costs, and this should be done whether the party request to see it or not.

(Title and Commencement § 7) —— ss.: T. B. a clerk in the office of G. W. S. Solicitor for, &c. *or* ——of——, ——, being duly sworn, &c. saith that on, &c. he personally served on M. N. named in the title of the above cause *or* matter, copies of the *two* several papers hereto annexed, viz. (as in No. 2.) and at the same time exhibited to him, and offered for his perusal, the annexed letter of attorney, *or* written authority, to receive said costs, and at the same time, and in behalf of ——, the said ——, he this deponent, demanded of him the said ——, payment of said costs, and also offered on condition of payment to give up the said original authority to him, and execute a receipt or other acquittance for said costs; but that the said —— wholly refused to pay said costs, *or* replied that it was not in his power, and that he should therefore not pay said costs, or words to that effect, and that he hath hitherto wholly neglected to pay the same, as this deponent is informed and verily believes. (Signed, § 7.) sworn, &c. [§ 8.]

No. 4. Order For Commitment

[Caption and Title, *post* § 32.] On reading, and filing a taxed bill (*or* if in several causes, *two* taxed bills) of costs in this cause, a certified copy of the order of this court heretofore granted therein, and an affidavit of the due service of said bill and certified copy by delivering copies thereof and showing the originals, to the said ——, and of a personal demand of payment of said costs, and that the said —— notwithstanding such demand has refused and neglected to pay the same: by which papers it appears that the said costs [are interlocutory costs(*a*) accruing in the progress of the above cause, and] are by virtue of the order of this court aforesaid, payable by the *defendant* ——, to the *complainant* ——, *or* his solicitor, and amount to the sum of —— (*or in* case of several bills 'amount together to the sum of——') dollars; and on reading and filing the taxed bill of costs and expenses of the proceedings on the part of the said —— to compel payment of the costs so ordered to be paid as aforesaid, and on motion of G. W. S. Esquire, Solicitor and of counsel for the said *complainant*: *It is ordered* that a precept be issued out of and under the seal of this court directed to the sheriff of —— for the commitment of the said —— to the prison of ——, until he shall pay the said sum of —— for the said costs so ordered to be paid, together with the said sum of —— for the costs and expenses of the proceedings to compel such payment, and also the sheriff's fees on said writ. On entering this order the (Assistant) Register or Clerk will also sign and seal.

5. Precept for Commitment.

An approved form of this writ is appended to the rules of the court.(*b*) When delivered to the sheriff [vol. 1. p. 14.] and executed, he is to detain the delinquent party as directed by the precept, and revised statutes.(*c*)

(*a*) The statute 2 R. S. 535. § 4. authorises a precept for commitment when any order of the court shall have been made 'for the payment of costs, or any other sum of money,' on affidavit of personal demand and refusal. The form of the precept as approved by the court [see *post* No. 5.] is for *interlocutory costs*.

(*b*) Rules p. 93. No. 10.

(*c*) 2 R. S. 535. &c.

CHAP II.

§ 22.

Vol. 1. p. 31. Taking advantage of irregularities.

Applications to discharge orders for irregularity must be made without delay.(a) But the principle of waver cannot apply to an erroneous and not merely irregular order (b)

No. 1. Notice of Motion to Discharge an Order for Irregularity.

No. 1. Notice of motion to discharge an order for irregularity. See order in such case *post* § 32.

[Title, *ante* p. 27. and commencement as in forms, p. 42. *or*] Take notice: the defendant ——, intends to move,(c) &c. on, &c. at, &c. or as soon after as counsel can be heard, that the order made in this cause, bearing date, &c. may be discharged for irregularity, with costs, to be taxed by one of the Vice Chancellors or Masters of this court. Dated, &c. (signed) C. D. defendant's Solicitor. To Mr. S. T. Solicitor for complainant *or* petitioner.]

§ 23

Vol. 1. p. 31. Petitioner setting aside a dismissal or dismissing his own suit

A petition struck out of the paper for non-attendance, may under circumstances be restored.(d)

No. 1. Order for voluntary dismissal.

No. 1. *Order to Discontinue.*

[Caption and Title § 32.] On motion of —— Solicitor for the petitioner in the above entitled matter: *It is ordered* upon payment of costs to be taxed, that the petition in the above matter stand voluntarily dismissed out of this court, *or* that this suit be discontinued.

2. Notice of such discontinuance, and that respondent do not appear.

No. 2. *Notice of Discontinuance.*

3. Notice for respondent not to appear, no suit having been entered in court, and a mistake in the papers served.

(Title) Take notice: An order has this day been entered in the book of common orders, kept by the (Assistant) Register, *or* Clerk of the —— circuit of this court, for the voluntary dismissal of the petition in the above entitled matters on payment of costs, [and as no costs have accrued, you not having appeared, you are notified not to appear, as the suit is discontinued accordingly.

(a) 10 Price 25 It was held (ib.) no excuse that the court did not set since the order complained of was obtained. That the court (of Exch.) like that of Chancery is now open as a court of equity during the whole year.

(b) 1 Sim. & Stu. 334.

(c) 2 Grant 179. 2 T. & V. Pr. 195.

(d) See 1 Buck. (B. C.) 107. 255. 2 Madd. 146. See 1 Younge and Jar. 611.

No. 3. *Notice for Respondent not to Appear.*(e)

(Title.) As there is a mistake in (the service of) the copy of the (petition, affidavit, notice of motion, &c.) with which you have been served in this suit, I hereby give you notice not to appear thereto, dated, &c. (*f*) See notice of countermand. [p. 43. No. 3.]

3 HEARING ORDERS AND DECREES.

§ 24. Vol. 1. p. 32. Hearing on presenting petition and orders thereon. See *post* § 25, 26, 27, &c.

The original affidavits in support or opposition are by the English practice filed, office copies being alone regarded and read in court on the motion; here the originals are read, and should be filed at the time of making or opposing the motion,(*a*) or as soon as any order is entered thereon. By the prevailing practice, counter affidavits are read without having been previously served on the party moving.(*b*) But it is questionable whether such affidavits ought not to be served agreeably to the spirit of the statute requiring mutual service, after appearance of all papers at any time filed in a cause. [vol. 1. p. 233.] If not previously served, or if so served, but not in time to enable the party moving to prepare supplemental affidavits in support of his motion, an adjournment for this purpose may, it seems, be applied for. [*ante* § 16.] But a petitioner cannot file affidavits in reply, except as to the new matter contained in those in answer to the petition,(*c*) and the rule in the Supreme Court is, that counter affidavits in support of a motion are inadmissible even to sustain the character of witnesses impeached by the affidavits of the other party.(*d*)

No. 1. *Order to take the Petition as Confessed.*

§ 25. Vol. 1. p. 32. No. 1. Order pro confesso. 2. Order to

[Caption and Title, § 32.] On reading and filing the petition of ——, of ——, bearing date the —— praying for, &c. (*state the general object*, see § 32.) together with the accompanying documents, and notice of

(e) This may serve before the petition, &c. are put on file or the suit entered in court.

(*f*) See Archb. Forms 540.

(*a*) See Sup. Ct. 5 Cow. 18. For though copies are used, yet the decision is founded upon the originals, and an attorney may on suggestion be compelled to file them.

(*b*) 5 Cow. 21.

(*c*) 1 Buck. B. C. 244.

(*d*) 3 Cow. 529. See 2 Wend. 296. sed vide 2 Caines 260.

CHAP. II.

open or set aside the same.
3. Order denying said motion.
4. Order denying motion founded on petition to open a decree taken by default at hearing.

motion for this day, and on reading, and filing an affidavit of due service of the same, and no one appearing in behalf of said respondent to oppose, on motion of ——, Solicitor for the petitioner: *It is ordered* that the said petition be, and the same is hereby taken as confessed, and it is further ordered that it be referred,(e) &c. [*post* § 32. 36.]

No. 2. *Order to Set Aside the Default.*

If the respondent seeks to open the decretal order for taking the petition as confessed, he may apply to set aside the default on terms; or if irregularly entered, with costs to be paid by petitioner. But applications to the court, when the party may have the effect of the motion without, are discountenanced; and if therefore an affidavit of merits be shown, and an offer made to the opposite party to pay the costs of the default, and to stipulate to appear and oppose at an early motion day, it is doubtful if such offer be refused, whether the court would allow costs of opposing the motion.(f) The terms are in the discretion of the court. [see § 56.] If necessary, apply for an order to stay proceedings on an *ex parte* application as directed. [§ 12.] Make affidavit, [§ 7.] that respondent has a defence on the merits, show an excuse for the default, if there be any, serve copy of the affidavit, *or* petition if by petition, and *notice* of the *motion* [§ 14.] 'that the decretal order [No. 1.] bearing date, &c. whereby the petition of —— in the above entitled matter was taken as confessed, and all subsequent proceedings be set aside (*or* opened *or* discharged) upon payment of costs, and on such terms as the court may direct, *or* for such other order, &c. [see § 14. No. 2. p. 42.] If for irregularity, say: be set aside or discharged for irregularity, with costs to be paid by the petitioner. [§ 22.] The order may be in this form: [Caption, title, and commence-

(e) An order is sometimes made without a reference, as in the case of petition by committee for appointment of an agent to see to some farms, &c. 2 Russ. 567.

(f) See in Sup. Ct. 4 Cow. 55. 3 Cow. 15. In that court a motion taken by default may be open of course without excuse for not opposing, any day during the term, both counsel being present. (1 Cowen 197.) To an affidavit of merits to open a default, affidavit in opposition, denying that defendant has a defence, is inadmissible. Ct. do not hear affidavits in opposition to affidavits of merits. 2 Wend. 296.

ment, see No. 1. *ante*, and *post* § 32.] A petition duly verified bearing date, &c. having been presented and read by —— (one of the) respondents in the title of this petition named, praying that the decretal order of this court of the date of —— last, whereby the original petition in this matter was taken pro confesso, might be set aside, and that he the said respondent might be admitted to appear, and oppose the said original petition and stating merits, and an excuse for his delay; and a motion being made in pursuance thereof, and the prayer thereof being opposed by the said petitioner, and the affidavit in support of the said original petition, and of one of the respondents ——, being read in opposition to the prayer of the present petition, and the case being duly considered, and the equity set up by way of defence, and as a ground of the motion not being denied: It is ordered that the respondent be admitted to appear, and oppose the petition of the said —— on, or before the —— day of —— next, on paying to the Solicitor of the said —— when taxed a rateable proportion as one of the respondents, of the costs of the said —— , on taking the petition pro confesso, and of the subsequent proceedings, and which rateable proportion shall be determined by the Master on taxation.

No. 3. *Order denying the Motion to open a Decree, on Ground of lapse of Time and no Equity.*

[Caption, Title, § 32.] On reading and filing the petition of the above-named defendants with the affidavits annexed thereto, and on reading and filing the affidavit of A. V. in opposition to the petition and the reasons in writing submitted by Mr. T. R. G. Solicitor and of counsel for the defendants, and of Mr. J. L. Solicitor and of counsel for the complainant, in support of the above petition and in opposition thereto; and due deliberation being thereupon had, and inasmuch as the defendants have delayed making the application for nearly eleven months since they were apprised of the decree, and inasmuch as the defendants do not show any merits entitling them to have the decree opened, but are seeking to

CHAP. II.

take advantage of a defective specification(*a*) in the judgment entered by the complainant at law, in order to obtain a preference over that judgment, which, if accompanied with a sufficient specification, would have been entitled at law to priority; and inasmuch as the defendants have lost that advantage by suffering the (*bill*) in this case to be taken pro confesso under a regular decree for that purpose without fraud; and inasmuch as the defendants are not entitled to the grace and favour of this court to assist or enable them to take such an advantage, but the complainant has equal, if not stronger equity against them: It is thereupon ordered, that the motion founded upon the said petition be denied with costs of the motion to be taxed, and to be paid by the defendants.

No. 4. Order denying the Motion to open a Decree taken by Default at Hearing.(b)

[Caption and § 32.] On reading and filing the petition of M. S. one of the defendants in this cause, and the papers accompanying the same, and on motion of Mr. D. B. O. of counsel for the petitioner, the same being opposed by Mr. W. of counsel for the complainant, and the affidavit of J. W. & G. W. S. read in opposition, and due deliberation had, it is ordered that the prayer of the said petition be, and the same is hereby denied.

§ 26. Vol. 1. p. 32.

The application to the Chancellor for a reference of the hearing of a cause to a Vice Chancellor, or where the cause was before a Vice Chancellor for reference of the hearing to the Chancellor may be by petition and due notice. [see p. 10-11.] The effect of such reference upon subsequent proceedings in the cause has been noticed. [see ch. 1. § 7. p. 9-12.] The mode in which the order of a Vice Chancellor may be discharged by an *appealed motion* to the Chancellor, sustained by new facts, or strictly by appeal, will appear hereafter. [§ 56, &c.]

Ch. 2. § 27. Vol. 1. p 32. Minutes or

1. (Title of cause *post* § 32.) Order: Reference to take account: Decree: that the mortgage is a subsisting

(*a*) A specification of the demand, in order to gain priority was formerly required on judgment at law entered by confession upon bond and warrant of attorney.

(*b*) See this case stated in the form of Counsel's Brief, *ante* § 17. No. 3. p. 51.

debt; that $390, the amount given by T. for the equity of redemption be charged against him; that his debt of $3000 be paid him if he surrender the estate, but if that be out of his power, the debt is to be regarded as extinguished. 2. (Title) This suit is dismissed with costs against the complainant, as to the defendants N. M. J. L. & L. L. and between the complainant and the defendants J. O. K. & L. M. it is referred to a master to ascertain and report the sum due to the complainant, by reason of the matters stated in the pleadings and proofs. Dated, &c. Copy, J. P. Register. 3. Minutes of decree prepared and served prior to hearing as recommended.(c) See the various forms of minutes of decree in the English books.(d) 4. The draft special orders or decrees are the minutes extended and put into form ready to be entered. The great majority of those given in the present volume were drawn by a former or the present Chancellor They will form a sufficient number of models for preparing, serving, and submitting as recommended, the draft order or decree sought.

1. or 1. memorandum taken at hearing of a decree, see the decree at length *post* § 36.
2. minutes taken and certified by the officer and furnished the solicitor to draw the decree.
3. minutes of decree prepared for hearing.
4. Draft decree in lieu of minutes.

Orders of course.

1. Orders of course(e) are such as these: for reference to assign Solicitor, &c. in favour of a poor person prosecuting; that a subpœna on filing bill issue; for appearance to subpœna: for attachment for non appearance thereto; to take the bill as confessed for want of appearance; common order of reference, or in case of infant defendants with adults, or where the defendants are all infants; in case of absent, concealed, or non-resident defendants; to answer(g) in forty days, or pro confesso, or attachment; that the bill be taken as confessed for want of an answer; for an attachment for want of answer; for requiring absent defendant to appear, he residing abroad, and not in Canada, or another of the United States; or in another of the United States or in Canada; or in this state, but concealed or absent;

(c) Vol. 1. p. 27-9. 169. 306. 326.
(d) 2 Newland Pr. Harr. &c.
(e) R. 46. Vol. 1. p. 34-5
(g) But see R. 42. Vol. 1. p. 269.

CHAP. II.

or to take the bill as confessed for want of an appearance after publication of the preceding order, or where the order in such case was served personally; or to amend bill in certain cases, and on, or without, costs;(*h*) to appoint a guardian ad litem; to deliver a copy of the bill; or for dismissing the suit with costs, for not delivering a copy of the bill; for reference on truth of a plea of matter of record;(*i*) orders on overruling plea or demurrer;(*k*) or on exceptions to answer and other proceedings;(*l*) to confirm report unless cause be shown to the contrary in eight days; or to examine witnesses, or defendants, or on commission, or to produce witnesses in forty days; or on order to enlarge time; to close proofs entered by party who served notice of order to produce witnesses; or by party who was served with notice of such order; and in some other cases, all of which will appear in their proper places.

2. A decree may be interlocutory or final, general, special, qualified or conditional. It is by no means of course to pronounce a general decree. It is only of course where the plaintiff succeeds against all the defendants, or all the defendants against him. There may be, and often are, many cases wherein the court, in its discretion, may model the decree so as to make out justice to the several defendants. It is every days practice to separate the costs, and apportion them amongst the various defendants, the court declaring how much shall be paid by some and how much by others of them. There is nothing in the machinery of the court to prevent that being done with the most minute and exact precision, either by making a separate decree, or severing a joint one.(*m*) Where the defence failed in consequence of unsatisfactory and incomplete evidence having been tendered, the court, at the request of the defendants, ordered the decree to be qualified by the introduction of a provision that it should not prejudice the right of the defendants to question any future claim of the like subject matter by the complainants.(*n*) So a decree of dismissal may be made without prejudice to another suit by complainants.(*o*)

(*h*) R. 43-4-5. See Vol. 1 *Index* Amendment.
(*i*) R. 48. See. Vol. 1.
(*k*) R, 49
(*l*) R. 51-3. 57. 64. See Vol. 1.
(*m*) 13. Price 511. A decree may be made between Co. defendants: *ante* Vol. 1. p. 327.
(*n*) 13. Price 500.
(*o*) See 3 Russ. 171.

§ 31.

Vol. 1: p. 36. 35. Consent *without prejudice.* Distinction between *agreement* by consent and waiver.

Orders at hearing or otherwise, applications to court, or other matters in a suit, are sometimes agreed upon between the Solicitors in the cause, '*without prejudice*;' that is, that though such arrangement is made or proposed, or order, &c. consented to for facilitating some particular object, it shall not be considered or permitted to operate to the *prejudice* of either party in regard of their respective rights or interests generally, in the suit, or otherwise, and that such rights or interests shall not be prejudicially affected thereby.(*a*) Under a former rule of the supreme court,(*b*) of which the rule of this court,(*c*) is a transcript, it has been held, that though the general rule requires all *agreements* to be in writing, yet service of a paper necessary to an order or any formal requisite in its service may be *waived* by parol. There is a distinction under such a rule between *waiver* and *agreement.*(*d*)

No. 1. *Order by consent (that Commission issue.)*

No. 1. Order by consent to be entered in the common rule book. (for commission abroad and return by mail.

(Caption and Title, *post* § 32.) On motion of G. W. S. Solicitor for the complainant, and with the consent of ——, Solicitor for the *defendant,* It is ordered that a *dedimus potestatem* issue in the above cause, directed to O. H. of W. in the county of F. and state of C., minister of the gospel, J. F, of the same place, farmer, and Z. D. of the same place, blacksmith, authorizing them, or any two, or any one of them, as commissioners to take the *answer*(*e*) of the said E. L. and J. L. to the bill of complaint in the above cause, and that the said answer when taken may be returned as an ordinary letter or package, and without the oath of the bearer, under an envelope addressed to the said —— Solicitor for complainant. Dated, &c. (Signed) ——, Solicitor for complainant, ——, Solicitor for defendants E. L. and J. L. (The consent being expressed, in the order, and signed by both Solicitors, it is not deemed necessary to add, 'I consent to the entry of the above order ——, Solicitor for the defendant,' though this is frequently done.)

2. Agreement as to return of commission.

3, Order by consent to discontinue suit

4. Agreement or stipulation between parties complainant that the suit shall be conducted without prejudice to future claims between complainants.

5. Do. agreement or consent of a third person to be bound by a decree

(*a*) 2 Grant. 348. n. 2 Ed. 1829.
(*b*) R. 12. Sup. Ct.
(*c*) R. 121. *ante,* Vol. 1. p. 36.
(*d*) 9 Cow. 119.
(*e*) But see as to mode of taking oath to an answer, &c. abroad, *ante* § 8. and *post* ch. 9. § 39, 40, &c. Vol. 1. same chapters & sections

CHAP. II.

in order to save the necessity of making him a party.
6. Admissions between Solicitors in lieu of proof.
7. Another form endorsed on back of a document

No. 2. *Agreement as to return (of Commission to examine Witnesses.)*

(Title of Suit.) It is hereby consented that the commissions about to be issued in this cause to *Liverpool* and to *Antigua* respectively, (for examination of witnesses) may be returned by any safe conveyance, under the seals of the commissioners, to the complainant's Solicitor; and that the same be thereupon opened in the presence of the Solicitors of both parties; and the papers being returned and opened as aforesaid shall have the like effect as if returned under direction of the court endorsed upon the commissions respectively. Dated, &c. J. R., Solicitor for complainant. B. T., Solicitor for defendant.

No. 3. *Order by Consent to discontinue.*

(Caption and Title § 32.) On motion of, &c. [as in No. 1.] and by the agreement and consent of the Solicitors for the respective parties in this cause, (except the defendant R. M. against whom the bill of complaint has been taken pro confesso:) It is ordered, that the above suit be discontinued, each party paying their own costs. Dated, &c. (Signed) G. W. S. Solicitor for complainants. C. G. Soliciter for the York and Jersey Steam Boat Ferry Company and T. B. jr. M. U. Solicitor for the Mayor, Aldermen and Commonalty of the City of New-York.

No. 4. *Agreement among Complainants that the Suit be conducted without Prejudice, &c.*

(Title of Cause.) It is hereby agreed, admitted and stipulated, that in any future difference or controversy which may arise or happen between the complainants themselves, or any of them, touching or relating to the matters in controversy in this cause, or in any degree collateral to the facts and circumstances stated in the bill, or otherwise connected therewith, though not stated in the bill, no advantage whatever shall be taken of the said bill by either party; but such difference or controversy shall be tried and determined, or otherwise adjusted, in the same manner as if this bill had never been filed, or as if the said complainant had not united therein. Dated, &c. (Signed) R. D. A. 'I also admit

that the above suit is to be conducted at my sole expense.' R. D. A.

No. 5. *Consent by Third Person to be bound, &c.*

(Title, &c. *In Chancery*: I. S vs. N. K. C. S. I. I, and T. W. W) I, J. G., of the county of O. and state of New-York, do hereby acknowledge, that the above named T. W. W. did, on the —— day of, &c. in the year, &c. sell and convey to me the one equal undivided third part of a certain tract or parcel of land in the town of W. and county of O. being the premises seventhly mentioned and described in the bill of complaint filed in the above mentioned cause; and that at the time of the said conveyance to me the above entitled suit had been commenced by the said I. S. for the partition or sale of the real estate of W. S. deceased; and that I had full notice and knowledge of the commencement and pendency of the said suit at and before the time of the said conveyance to me by the said T. W. W.: And I do hereby agree to be bound, and to abide, by any order or decree that may be given in the above entitled cause against the said T. W. W. in relation to the said premises in the same manner as though I had been made a party to the said bill, and such order or decree had been entered against me individually. Dated, &c. (Signed and witnessed.)

No. 6. *Mutual Admissions instead of Proof in the ordinary Way.*(a)

(Title.) The Solicitor for N. M., I. L. and L. L. three of the defendants in this cause, hereby admits the genuineness of the four several paper writings hereto annexed, all bearing date the —— day of ——, and marked respectively A, B, C, D.; A and B being severally signed by I. L. for himself and L. L.; B. being also signed by N. M.; C. being signed by N. M alone, and D. being signed by J. L. alone. The above four documents being admitted by the defendants at the request of the complainant, and are to be considered as his testimony, and may be read in evidence accordingly.

(a) If an admission be inadvertently given, move the court on affidavit, notice, &c. for an order to retract it. *Ante* Vol. 1. p. 15. See an order, Blake 57. appx.

CHAP. II.

The Solicitor for the complainants in this cause hereby admits the genuineness of the five several paper writings hereto annexed, marked respectively E, F, G, H, I. The said paper marked E, being a receipt signed by, &c. ; F, being a bill of sale, &c. ; G, being a mortgage, &c. (*describe them briefly.*) The said documents being admitted by the complainant at the request of the said three defendants, and are to be considered their testimony, and may be read in evidence accordingly. And the said complainant hereby further admits, that the consideration of ——, specified in the said bill of sale marked F., was not, nor was any part of the same paid by the said J. L. to the said R. M., the said consideration having been therein inserted pro forma, and that nothing was ever received for the articles so assigned, the same having been distrained and sold by Mr. R. for rent in arrear for the said distillery, &c. Dated, &c. (Signed by the Solicitors.)

No. 7. *Admission Endorsed on the Document.*

(Title.) It is admitted that a letter, whereof the within is a copy, signed by the defendant O. M., was delivered by the complainant at the time of the date thereof; that this admission, and the within copy of the said letter may be read on the hearing of this cause as a part of the proofs therein, without further proof. Dated, &c. (Signed) ——, Solicitor for complainant.

§ 32. Vol 1. p. 29. No. 1. Formal parts of orders and decrees. Caption, Title, Commencement, &c. Specimens of orders and their use. Examples: *First*, Orders on petitions. *Secondly*, On motions, viz. No. 2. Order

No. I. FORMAL PARTS OF ORDERS AND DECREES.

These are: 1. Caption; 2. Title; 3. Commencement; 4. Declaratory part; 5 Ordering or Decretal part.

1. *At a Court of Chancery held for the State of New-York, at the City of* —— [or *Town of —— County of ——*] *on the —— day of —— one thousand eight hundred and* —— :

Present :

REUBEN H. WALWORTH, Chancellor.

or,

——, Vice Chan'r of the — Circuit.

2. A —— B ——
vs.
C —— D——

or,

In the Matter of the President, Directors and Company of the '—— Bank in the City of ——.'(a)

or,

In the Matter of the Petition of —— and of ——, an infant, by —— his Mother and next friend and Guardian in Socage.

or,

In the Matter of the Petition of ——

or,

In the Matter of ——, a Lunatic.

3. (b) On reading and filing, [*or* 'on reading,' if the petition be not immediately filed; as where it is referred to a Master to make his report, before it is presented, as on petition for appointment of a general guardian, ch. 4. § 29.; or special, for sale of infant's estate, ch. 5. § 3.] the petition of —— of ——, ——, (*or* one of the defendants in the above entitled suit (see *ante* § 5-7.) duly verified by the oath of the petitioner, [§ 8.] *or* supported by the affidavit of ——, ——, *or* certificate of —— [§ 7-8] which petition bears date the —— (if not dated take the date of the jurat) and prays (state the leading object, as 'the sale of certain real estate of the said infant therein particularly described,' *or* for a temporary injunction and appointment of receiver

(a) See 1 Paige 85. form of an order for receiver, &c.

(b) See as to *commencement* of *orders* on *motions* (*post* No. 5.) and *decrees* on *hearing* (No. 6.)

of reference on petition for payment of money or transfer of stock, the petitioner having arrived at age.
No. 3. Declaratory order as to Solicitor's lien for costs
4. Do. as to Examiner's fees.
No. 5. Orders on *motions*: commencement of such: Order to set aside for irregularity: do. to amend.
No. 6. Decree, ordecretal order on cause bro't to hearing: commencement of such: Form of such in extenso: setting aside a conveyance on the ground of lunacy.

CHAP. II.

in the above cause, for the special reasons set forth in said petition:) on reading and filing also, the affidavit of ——of —— &c. *or* of ——, the respondent (*or* complainant, *or* defendant) in opposition thereto, and after hearing Mr. J, L. W. Solicitor and counsel for the Petitioner, and Mr. A. V. V. Solicitor and counsel for the respondent, *or* defendant in said cause: *or* on reading and filing the petition and a notice of motion pursuant to the prayer thereof, an affidavit of the due service of a copy of the said petition and notice on, &c. and no one appearing to oppose, on motion, &c. ordered, &c.: *or* on reading and filing the petition, &c. with the affidavit and vouchers accompanying the same, *or* with notice of a motion pursuant to the said petition and affidavit of due service thereof, or an agreement signed by J. O. W. Esq. and an admission by N. P. R. Solicitor for the complainants of the due service of a copy of said petition and notice, and on motion of Mr. ——, ——, of counsel and in behalf of ——, ——, Solicitor for the petitioner, &c. *or* a motion having been made by Mr. B. F. B. & Mr. S. A. F. in pursuance of the prayer of the petition of J. L. & others, bearing date, &c. for (state the leading object of the petition as an amendement, &c., or that P. B. one of the defendants, be required to bring into court the bond, &c.) *or* a motion having been made by I. L. in proper person in pursuance of the prayer of his petition bearing date, &c. for a re-hearing of this cause upon the subject matter, and for the reasons stated in the said petition; and the said petition, with the affidavits and documents thereto annexed being read, and the motion argued by Mr. R. S. and Mr. J. V. H. in behalf of the motion, and by Mr. W. W. and Mr. S. J. in opposition thereto, and duly considered: It is ordered, &c. that the said motion be granted, &c.; *or* that the said motion, founded upon the said petition, be denied with costs, *or* that it be referred to one of the Masters of this court to inquire into the truth of the facts stated in the said petition, &c., *or* 4. *It is declared*, that, &c. *And it is further declared that*, &c. [see forms *post* No. 3, 4, &c.] 5. *It is thereupon ordered*, that; &c. [*post.*] And *inasmuch* as it appears that, &c.: It is further ordered that, &c. (signed or endorsed if special: Approved, R. H. W.;' or 'Enter the within order: —— Vice

Chancellor of —— circuit.' The (Assistant) Register or Clerk enters it accordingly in the common or special order book, with the date of its entry in the margin. (see § 33.) The orders are to be paged and properly endorsed, (see *ante* p. 23.]

Specimens of orders, and their use.

A principal use of specimens of orders is, to give the terms and language of notices of motion, petitions and affidavits, as well as to exhibit the points of practice.(*a*)

No. 2. *Order of Reference on Payment or Transfer of Stock, &c.*

(Caption as before.) In the Matter of the Petition of M. H. T.: On reading (and filing) the petition of M H. T. of the city of Philadelphia, dated, &c. and duly verified pursuant to the statute and rules of this court [*ante* § 8.] setting forth(*b*) that on the —— day of —— in the year one thousand eight hundred and——, the sum of —— hundred dollars and —— cents was paid pursuant to an order of this court, made and entered in a certain cause heretofore pending therein, in which M. T. was complainant, and G. T., the said petitioner and others, were defendants, into the hands of —, (Asst.) Register (*or* Clerk of, &c.] of this court, to the credit of the said petitioner, at that time a minor under the age of twenty-one years, to be by the said (Assistant) Register invested for the use of the said petitioner during her minority; that he did invest the same in six per cent. stock of the United States to the amount of —— dollars and —— cents, and has subsequently received thereon the aggregate amount of —— dollars and —— cents for interest; and further setting forth that the said petitioner did, on the —— day of —— instant, attain the full age of twenty-one years: and also on reading the certificate of ——, the (Assistant) Register aforesaid to the said petition annexed, and on motion of Mr. W. of counsel for the petitioner: It is ordered, that it be referred to one of the Masters of this court, to inquire into the truth of the facts stated in the said petition, and that the said Master receive as competent evidence upon the

(*a*) 2 Grant 217. n.

(*b*) Under the new rules [v. 1 p. 37.] it might be perhaps sufficient to say, 'praying for the transfer of certain stock standing in the name of the Assistant Register, to the use of the petitioner, as particularly set forth in said petition.'

CHAP. II.

said reference depositions taken before the mayor of Philadelphia, (*b*) (or before one of the judges of the court of — under the seal of the said court, and authenticated in the mode directed by the revised statutes;) and upon the coming in of the Master's report establishing the *identity* [see § 7.] of the said petitioner as a former party in the original suit; and the fact of the said petitioner having attained to lawful age, the said ——, (Assistant) Register as aforesaid, is hereby ordered to transfer the said stock, and pay the —— dollars and —— cents to the said petitioner, or her Solicitor. [See vol 1. p. 266.]

No. 3. *Declaratory Order as to Solicitor's Lien for Costs.*

(Caption, Title, &c. No. 1.) A motion having been made pursuant to the prayer of the petition of D. B. one of the above complainants, and the petition with the affidavits of the said D. B. thereto annexed being read, and the affidavit of S. K. Solicitor for defendants, in opposition to the motion being also read, and the motion argued by Mr. A.V.V. on behalf of the petitioner, and Mr. M. on behalf of S. R. the Solicitor for said defendants, and the case being duly considered in reference to the motion founded on the said petition: *It is declared* that notwithstanding the rule of this court is, that the Solicitor's lien for costs is not permitted to interfere further than upon the clear balance which is the result of the arrangement and settlement by set-off, of the equities between the parties, yet that in this case no set-off can be admitted between the executors of V. N. and the defendant B., inasmuch as the defendant B. in his answer advances pretensions, and claims for damages by reason of his expenses and improvements laid out on the factory in the pleadings mentioned under an agreement between him and the said V. N. which leaves the question of contribution claimed by the executors of V. N. and the extent of it unsettled, and uncertain, and not the proper subject of set-off [vol.1. 265.] *It is thereupon ordered* that the prayer of the petition be denied without costs thereof: (or that the prayer of the said petition be denied with the

(*b*) The above order was granted prior to the late provision, 2 R. S. 396. *ante* § 8. and vol. 1. p. 21. n. 2.

costs of the defendant in resisting the said petition to be taxed, and to be paid by the complainant.)

No. 4. *Declaratory Order as to Examiner's Fees.*

(Caption, Title, &c. No. 1.) A motion having been made by Mr. H. on behalf of the complainant in pursuance of the prayer of his petition for an order upon —— Esquire, one of the examiner's of this court, to refund to the complainant the money paid him for a copy of the deposition of D. C. as having been paid by mistake, and also for an order upon the said —— to deliver to the complainant a copy of his bill of costs as examiner in the said cause, and the petition of the complainant, and his affidavit annexed thereto being read in support of the motion, and the same being opposed by Mr. B. on behalf of the said —— and the affidavit of the said —— together with a copy of the letter of R. W. S. thereto annexed, and the affidavit of M. T. being read in opposition to the motion, and the same being duly considered, and *inasmuch* as there is no evidence in the case of extortion or corruption on the part of the said —— in receiving payment for a copy of the said deposition, and as the said copy was received, and paid for by the agent of the complainant upon a full explanation of the circumstances under which it was made, and after a call for a copy of all the depositions taken by the said —— in the said cause had been duly made, and as it was made, and delivered in good faith. It is not deemed a case proper or warranted by the course and practice of the court for the summary and extraordinary interference of this court, and the complainant is left to his ordinary remedy at law (if any he hath) for the recovery back of the money on the ground of payment by mistake. And in respect to the residue of the motion: *It is declared* that the said —— ought to furnish to the complainant a copy of his bill of fees, as examiner in the above cause, stating the amount of his charges upon each deposition taken before him, and that this is according to the course and practice of the court. *It is thereupon ordered* that Mr. —— furnish such copy to the complainant or his Solicitor upon demand, or within eight days thereafter.

CHAP. II.

No. 5. *Order Dissolving temporary Injunction, and Dismissing Petition, against a Bank.*

(Caption as in No. 1. Title.) The people of the state of New-York, upon the relation of the bank commissioners vs. the President, Directors and Company of the Bank of C.

An order having been made in this cause on the — day of — last, requiring the president, directors and company of the Bank of C. to show cause before the Chancellor why an injunction should not be granted and a receiver be appointed, as prayed for in the petition presented by the bank commissioners of the state of New-York; and a temporary injunction having thereupon issued; and on reading and filing the answer of the defendants and other papers on their part, and on hearing Mr. C. of counsel for the defendants, Mr. D. in behalf of the bank commissioners, and Mr. B. F. B. in behalf of certain stockholders of the bank in the city of New-York, by which it satisfactorily appears to the chancellor that the large debts due to the bank which were considered doubtful have been secured, and that the stock which was in the hands of a few individuals, and for which their stock notes were given to the bank has been sold and distributed among a great number of responsible and bona fide purchasers thereof, which arrangement is satisfactory to the bank commissioners, and to such of the other stockholders of the institution as have appeared and examined the papers presented to the Chancellor; and it also satisfactorily appearing to the Chancellor that the said bank is now solvent, and that the bills thereof are entitled to full credit as a part of the circulating medium of the state: It is thereupon ordered, that the temporary injunction issued in this cause be dissolved, and that the petition be dismissed

No. 5. *Orders on Motion; to Set Aside for Irregularity; to Amend, &c.*

Orders on motion.

(Caption and Title, No. 1.) On reading and filing a notice [*ante* § 14.] of this motion, an affidavit [*ante* § 7.] of D. T. thereto annexed, and an affidavit [§ 17.] of the due service of said notice and of a copy of the said affidavit, and on motion of S. S. G. in behalf of said D. T. the same being opposed by Mr. W. of coun-

sel for the complainant: It is ordered, &c., *or* a motion having been made by Mr. S. A. F. on behalf of the children, and heirs at law of the defendant, who is now deceased, to set aside the proceedings in this cause subsequent to the filing of the bill, (or presentation of the petition) and the same being opposed by Mr. G. L. F. Solicitor for the complainants, and the documents and affidavits in support, and in opposition to the motion being read and fully considered: It is ordered that the proceedings in the said suit on the part of the complainants (*or* petitioner) subsequent to the —— of —— last and including the order of the —— day of —— last, for taking the bill pro confesso be set aside as being irregular, and that the answer of the defendant filed on, or about the —— day of —— last, be considered as duly filed, and that no costs of the proceedings set aside as aforesaid, or of this motion, be charged by either party as against the other. (Caption and Title, No. 1.) *or* on reading, &c. a notice of a motion for leave to amend the bill (or petition) filed in this cause (or matter) and the affidavits accompanying the same; the same being moved by Mr. E. in behalf of Mr. E. W. K. Solicitor for the complainant, (or petitioner) and opposed by Mr. B. Solicitor for the defendant, and due deliberation thereon had, and *it appearing* that security for costs has not been filed pursuant to a former order entered in this cause, and which order is still in force: *It is thereupon ordered* that the said motion be, and the same is hereby denied, and it is *further ordered* that the question of costs on this motion be reserved.

No. 6. *Decrees or Decretal Orders on hearing: Decree Setting aside a Conveyance on Ground of Lunacy.*

(Caption and Title, No. 1.) This cause having been brought to a hearing (before the Vice Chancellor of the —— circuit, *sitting for the Chancellor, the Chancellor being a party in said cause, or* having previously to his appointment as Chancellor been *engaged as counsel for the complainant, &c. or* to whom the same was referred by the Chancellor for hearing and decision) on bill taken as confessed, *or* on Master's report, or on exceptions to Master's report, and upon the equity reserved, *or* on bill and answer, *or* on pleadings and

proofs (see forms *post* under diffierent stages of suits) and the same being argued by Mr. —— of counsel for complainant, and Mr. —— of counsel for defendant, the pleadings, &c. being read and due deliberation being thereupon had: It is *declared*, &c. and thereupon *it is adjudged and decreed*, &c.

Decree setting aside, &c. on ground of lunacy.

(Caption (*a*) No. 1. Title:) C. S., W. B. & M. H. vs. J. C., B. R., S. K. & J. C. This cause having been brought to a hearing upon the pleadings and proofs on the twenty eighth day of October last, and the same being on that day debated by Mr W. of counsel for the complainants, and by Mr. H. W. W. of counsel for the defendants, and due examination of the said pleadings and proofs being given, and due deliberation being thereupon had: *It is declared* that the lunatic in the pleadings mentioned, was not of sound mind and mentally competent to make the purchase of the defendants in the pleadings mentioned either on the *sixth* or on the *fourteenth* days of *April*, in the year one thousand eight hundred and eighteen: *And it is further declared*, that there is not sufficient proof in the case to impeach the integrity or honest motives of the defendants or either of them, in making the contract of sale in the pleadings mentioned with the said T. H. on the *sixth* and on the *fourteenth* days of *April* aforesaid, or that they then knew, or believed that the said T. H. was not *compos mentis* as aforesaid: *It is thereupon adjudged and decreed*, and the Chancellor by the authority of this court *doth adjudge and decree*, that the deed executed by the defendants to the said T. H. on or about the *fourteenth* day of *April* in the year one thousand eight hundred and *eighteen*, and the bond and mortgage of the same date, executed by the said T. H. to the defendants, or to the three first of them above-named, are and were from the time of the execution and delivery thereof null and void, and of no force and effect whatosever in law or equity. *And it is ordered* that the defendants on service of a copy of this decree deliver up the said bond and mortgage to the complainants to be cancelled, and that they also give the requisite certificate or acknowledgement of satis-

(*a*) The caption of this decree was 29 December, 1820.

faction of the said mortgage by virtue of this decree, to the end that satisfaction of the same may be entered of record, and that the complainants at the same time deliver up to the defendants to be cancelled the deed aforesaid, to the said T. H: *And it is further adjudged and decreed*, That no costs be charged by either party as against the other, and that the costs and charges incurred on the part of the complainants will be a just and proper charge by them as committee against the estate of the said lunatic, which they hold in trust, and that the costs and charges incurred on the part of the three first named defendants, would seem to be for aught that now appears to the contrary a just and proper charge by them, as trustees against the estate which they hold in trust: *And it is further ordered, adjudged, and decreed*, That the defendants pay to the complainants, within ten days after service of a copy of this decree, the sum of thirteen hundred and eighty dollars, which were paid to them by the said T. H. in April and May one thousand eight hundred and eighteen on the sale and purchase aforesaid, and declared void as aforesaid, or that the complainants have execution therefor, with interest after such default according to the course and practice of the court; *it appearing* equitable under all the circumstances of this unfortunate case, and of the deterioration which the estate so conveyed may have sustained, and for which the complainants are not responsible to presume that the money so received by mistake of right was not appropriated, and therefore is to be returned without interest: *And it is further ordered*, That this decree be deemed, and taken to be rendered, and entered as of the twenty eighth day of October last, when the said cause was argued.

§ 35. Vol. 1. p. 39. Service of orders. No. 1. Notice

On serving the copies of an original or certified copy thereof show the latter, if you intend to bring a party into contempt; if not, a copy is sufficient,(*a*) or a notice of the order, where it is a common order.(*b*)

(*a*) See also 7 Cow. 148. 3 J. 20. 2 J. 104. and authorities *post* to No. 2. A step taken before an order actually served is good (illustrated 2 Russ. 577.) The court will presume that an order after made will be duly promulgated, and after lapse of two years, that all persons are cognizant of it. See 1 M'Clell. and Y. (Ex.) 209. (*b*) In Sup. Ct. notice of a rule to amend a pleading, where it is of course, need not be given. 3 Wend. 424.

CHAP. II.

of a common order.
2. Notice endorsed on certified copy or copy of such certified copy.
3. Affidavit of service of copy of certified copy of order.
4. Affidavit of personal service of a decree (see the decree referred to in this affidavit, *ante* § 32. No. 4.)
5. Affidavit of service on a clerk of the agent of the Solicitor: & that the agent of the Solicitor afterwards admitted he received the copy of a certified copy of a common order to answer.
Note: a notice of such order without service of copy of the order itself is sufficient.

Service of an order to ground a motion for another order for commitment on partners, even where there are two Solicitors in partnership must be on each, service on one, and leaving copy for the other at their partnership office showing the original (as an order on them to deliver their bill of costs within a fortnight) was insufficient. No order can be made to commit two persons for not obeying a previous order served on one only.(*a*)

No. 1. *Notice of a Common Order.*

(Title, &c. *ante* p. 24. 42. 54.) Take notice: An order has this day been entered by the (Assistant) Register (*or* Clerk of the —— circuit) of this court, in the book of common orders kept by him for that purpose, requiring that, &c. (follow the ordering part of the order) Dated, &c. your's, &c. —— Solicitor for ——.

No. 2. *Notice Endorsed on Copies of Orders to be Served.*

Endorse on the certified copy of the order, or on the copies of such certified copy, a notice to this effect. (Title.) Sir you will please to take notice that the within is a copy of the order of *reference* obtained in the above cause and entered in the office of the (Assistant) Register (*or* Clerk of the —— circuit) of this court. Dated, &c. your's, &c. G. W. S. Solicitor for complainant. (Addressed.) To ——, the respective Solicitors for defendants.)

No. 3. *Affidavit of Service of Copy of Certified Copy of an Order.*(*b*)

(Title.) City and County of New-York, ss.: C. W. a clerk in the office of G. W. S. Solicitor for the complainant in the above entitled cause being duly sworn

(*a*) 2 Russ. 255.

(*b*) The requisites to a 'due service must be stated as in affidavits of service in other cases. See p. 54, 55. &c. and notes. The affidavit of service of orders as well as of process should not only be true, but to be of use should fully prove a good service. Therefore if plaintiff's name, the court, manner of service or any thing material be omitted, no attachment must issue, for until a *due* service be shown, no contempt appears to the court. Grant. Harr. Wy. Pr. Reg. T. & V. Pr.

doth depose and say (see other forms *ante* § 17.) that he did on the —— day of —— in the year, &c. personally serve on H. R. mentioned in the annexed certified copy of the original order entered in this cause (*as the purchaser of a certain lot therein also mentioned and described*,) a copy of the said annexed certified copy of the said order, together with a notice thereon endorsed, that the same was such copy as aforesaid; and this deponent at the same time showed(*b*) to the said H. R. the said annexed certified copy subscribed with the original signature of the (Assistant) Register (*or* clerk of ——circuit) of this court.·(Signed) C. W. Sworn this, &c. before me, &c. [§ 8.]

No. 4. *Affidavit of Personal Service of a Decree.*

(Title of cause and beginning of affidavits, *ante* § 7. 17.) In Chancery: C. S., W. B. and M. H. *vs.* I. C., S. K., B. R., &c.: City and County of New-York, ss.: C. S. one of the complainants in this cause being duly sworn, doth depose and say, that on the — day of — in the year, &c. he called upon S. K. one of the defendants in the above cause, with an office or certified copy of the decree granted in this cause, under date of —— day of —— last, with a copy of the said decree, and the deed executed by said defendants to T. H. the lunatic mentioned in the pleadings and proofs in this cause, for the purpose of serving a copy of the said decree, and surrendering up the said deed and demanding a compliance with the said decree on the part of the defendants: That the said S. K. refused to receive a copy of the said decree, or to read the said office copy, or to take back the said deed; but stated that he had before seen the said decree, and knew what it was; that he did not mean to comply with it, but had applied for a rehearing [see *post* § 59. No. 2.) of the said cause. (Signed) C. S. Sworn this, &c. [§ 8.]

No. 5. *Affidavit of Service on Clerk of an Agent.*

(Title and commencement, see § 7. 17.] City and County of New-York, ss.: C. D. S. student at law in the office of G. W. S. Solicitor for the complainant in this cause, being duly sworn doth depose and say, that on the —— day of ——, &c. he did personally serve a

(*b*) 19 Ves. 380.

CHAP. II.

copy of the annexed (certified copy of the) decretal order upon a person in the office of S. S. G. Esq. the agent of F. C. W. Esq. Solicitor for the defendant D. T.; and this deponent further saith, that on the same day the said S. S. G. Esquire acknowledged to this deponent that he duly received the said copy of the said decretal order; and also this deponent saith, that he showed the original hereto annexed to the person on whom he served the copy at the time of such service. (Signed) C. D. S., Sworn, &c.

REFERENCE.

No. 1. *Order of Reference to state an Account.*

§ 36. Vol. 1. p. 40. See post § 54-6.

No. 1. Decretal order of reference(a) See post § 54 to state an account, the principles on which the account is to be taken, being settled in the decree. See a like order for Ex'rs. trustees, and guardians to account. 2 Wend. 77. No. 2. clause in a decree requiring production of books, and examination

[Caption, Title, and Commencement, § 32.] Title (see p. 23.) J. B. M., B. Mc'. G. and J. B. G. trustees for all the creditors of J. E. an absconding debtor, vs. E. L. and F. T. This cause having been brought to a hearing upon the pleadings and proofs therein, and having been argued by Mr. George Griffin of counsel for the defendants, and by Mr. Peter A. Jay, and Mr. Josiah Ogden Hoffman, of counsel for the complainants, and due deliberation having been thereupon had, it is thereupon ordered, adjudged, and decreed, and the (Vice) Chancellor (of, &c.) doth hereby order, adjudge and decree, that it be referred to one of the Masters of this court to take and state an account between the parties complainants and defendants, touching and concerning the various matters of account in the said pleadings and proofs mentioned. That in stating the said account, the mortgage for three thousand dollars in the said pleadings, and proofs mentioned be deemed and taken as a subsisting debt, with leave to the complainants to redeem the said mortgage at any time within thirty days after service of a copy of this decree upon their Solicitor, and that if they shall elect so to

(a) The court can make no order upon what is not stated in the bill, which if necessary may be allowed to be amended, and the motion for reference stand over. (3 Madd. 433.) The order should specify the principles on which accounts are to be taken, or the enquiry proceed, as far as the court has decided thereon, and the examination is to be limited accordingly. Remsen v. Remsen, 2 J. Ch. 495. 501. 1 Johns Dig. 363. *ante* vol. 1. 44-5. 309.

redeem, then the sum of three hundred and ninety dollars, being the amount paid by the defendant F. T. for the purchase of the equity of redemption of the premises covered by the said mortgage, be deemed as paid to the defendants on account of the said mortgage on the day when the equity of redemption was purchased at the sheriff's sale, as stated in the said pleadings and proofs; but should the complainants not elect to redeem within the said thirty days, then the said defendants in taking and stating the said account shall be credited the whole amount of their said mortgage debt of three thousand dollars, after deducting therefrom the said sum of three hundred and ninety dollars with interest on the balance to be computed by the said Master; and if the complainant shall elect to redeem as aforesaid, and the defendants shall have put it out of their power to permit the said redemption by having in the mean time conveyed the said premises, then in taking and stating the said account, the said mortgage debt shall be regarded by the said Master as extinguished; and that the said Master do state and report to the court the balance which on said account shall be found due from either party to the other, and that all further directions be reserved until the coming in of the said report.

CHAP. II.

under oath of party, &c. No. 3. Decretal order of reference to ascertain damages for non-performance of an agreement. No. 4. Like order to assess moiety of expenses for taking down a party wall and erecting a new one, with usual reservation till after report, and that the decree be entered nunc pro tunc (one of the defendants having died since argument.) *Introduction to the Master's office.*

No. 2. *Clause Requiring Production of Books and Examination under Oath of Party, &c.*

And that, for the better taking the said account, and discovery of, and concerning the several matters aforesaid, the parties shall produce before the said Master, on oath, all books, papers and writings, in their custody or power, or in the custody or power of any of them, relative thereto, and shall be examined upon interrogatories as the said Master shall direct.(*b*)

No. 3. *Order to ascertain Damages for non-performance of an Agreement.*

(Caption, Title and Commencement, § 32.] Title: R. S. vs. J. W., R. T., M. W., impleaded with A. D.,

(*b*) Hart v. Ten Eyck, 2 J. Ch. 513. see other forms in the authorities cited. ib. p. 518. and *ante* vol. 1, p. 41. 43. and 45. *notes.*

CHAP. II. R. W., &c. This cause being brought to a hearing on the pleadings and proofs, and the same having been argued by Mr. J. V. Henry, of counsel on behalf of the complainant, and by Mr. Buel and Mr. A. Van Vechten, of counsel on behalf of the defendants, W., T. & W., and due deliberation being thereupon had, *It is ordered*, &c. [as in No. 1.] that this cause as between the complainant and the defendants J W, R T, & M W, be referred to one of the Masters of this court residing in either of the counties of A. R. or W. to be agreed on by and between the said counsel for the parties, or to be designated by the Chancellor [see § 37.] if they cannot agree; and that it shall be the duty of such Master to ascertain and report the damages sustained by those three defendants by reason of the non-execution and abandonment on the part of the complainant of the covenant and agreement by and between them and the complainant, made on the —— day of April in the year of our Lord ——, and in the pleadings set forthor mentioned; and that the said Master, with a view the more precisely to ascertain such damages, state and report the amount due to the said three defendants for the work done and materials furnished, and for all other expenses by them actually and *bona fide* incurred pursuant to the said covenant and agreement prior to the —— day of Aug. in the year aforesaid, when the further execution of the said agreement was abandoned by reason of notice of the inability or refusal of the complainant to fulfil it, and also to ascertain and report in addition thereto the amount of the actual loss & injury (if any) which the said three defendants may have sustained by reason of the said inability or refusal, and consequent abandonment of the said contract on the said —— day of Aug.; and that the report of the Master be founded on the pleadings, exhibits and proofs taken in chief in this cause, and on such other evidence as either party may furnish under the directions of the said Master; and that the said Master report thereon with all convenient speed; and that the question of costs, and all further questions, be reserved until the coming in of the report.

No. 4. *Like Order to assess Moiety of Expenses for taking down a Party Wall, and erecting a new one, &c.*

(Caption, Title, &c. § 32. S. C. vs. P. M. and P. D.] This cause having been brought to a hearing at the last —— term of this court in the city of ———, and having been argued upon the pleadings and proofs by Mr. Wells and Mr. Baldwin, on the part of the complainant, and by Mr. W. Slosson on the part of the defendants, and due deliberation being thereupon had, It is thereupon ordered, adjudged and decreed, and the Chancellor doth accordingly adjudge and decree, that the wall in the pleadings mentioned was a party wall, and that under the circumstances of the case, as disclosed by the pleadings and proofs, the complainant had a right to take it down at the time and in the manner stated in the proofs, and that the defendant P. M. ought to be chargeable with a moiety of the expense of taking down the old wall and of erecting the new one in the pleadings and proofs mentioned, to the height of the old wall: And it is further ordered and decreed, that it be referred to one of the Masters of this court to ascertain and report the amount of the moiety of the costs and charges of taking down the old wall, and of erecting the new one to the height of the old wall, and that he report thereon with all convenient speed; and that in addition to the proof already taken in the cause, either party be at liberty to produce before the Master such further proof on that point as the Master shall deem expedient and proper; and the question of costs, and all further questions, are reserved until the coming in of the report: And it is further ordered, that this decree have relation back, and be entered as of the —— day of —— last. (*a*)

Consolidation of suits with a view to proceedings in the Masters office.

The *consolidation* of two suits instituted by the parties mutually against each other, for objects sufficiently similar to render the proceedings under one suit in the Master's office available to both, so as to save the expense of double proceedings, may be, and usually is effected by an order (made at the hearing of that suit which being most forward is first heard) on the application of the counsel. The direction in such case is, that one of the suits only shall be proceeded in, and the parties in the other carry in their claims before the Master under that suit. So also in the Master's office, the claims of numerous indi-

See the case 4 J. Ch. 334. 342.

CHAP. II.

viduals, as legatees for instance, being of one class, and claiming under one right, should be *embodied* into one claim, or at most two or three, or as few as conveniently may be, and not a separate claim carried in for every individual claimant at great expense; and this the Master himself will direct in cases requiring it, either with or without application.(*a*)

PROCEEDINGS IN THE MASTER'S OFFICE.

§ 37. Vol. I. p. 41, Introduction to the masters office with copy of the order or ordering part: before what masters.

The Solicitor's introduction to the Master's office is with a copy of the decree or order, or of the ordering part of it. If the order or decree, after being duly passed and entered, [§ 27-35.] under which the particular proceeding to take place before a Master on a reference arises, is a short one, and wholly relates to the subject of reference alone, an entire copy would be proper. If it comprises more than the immediate subject of reference, then a copy only of *so much* of the *ordering part* as relates to the matter in hand, is left with the Master. Such copy is preceded by an exact copy of the *title of the cause* copied verbatim in the inner or *half* margin of the paper bookways, then in the common or outer *quarter* margin, the further copying is begun at 'Whereupon, (or whatever other general word begins or precedes the order of the court, as, 'This cause having been brought to hearing,' &c. *or* 'On reading and filing a petition,' &c.; and 'It is declared, &c. [see § 36. No. 1-4.] no notice being taken of the statement of the hearing of the parties, but '&c.' added in substitution of such statement; and then in the words of the decree or order, 'It is ordered, &c. to the end of the order, verbatim. This is called *making a copy of the ordering part of the decree* (or order) for the Master's office. It is done by the Solicitor from the original (or certified copy) and the copy compared with the original (or certified copy) when left at the Master's office. It may be convenient, on many occasions, if in the margin of the decree or order, not only the several subjects are marginally abstracted, but, if *opposite* the word 'Whereupon,' (or which begins the order of the court) a mark be made to point it out.(*b*)

(*a*) 1 Grant 382. 2d ed. 1829. (*b*) 1 Grant 253. 2d ed.

An order of reference when obtained of *course* by a Solicitor residing in the city of New-York, must specify the name of the Master by whom the same is to be executed; if the parties to the reference, or their Solicitors, do not agree upon a Master to be designated in the order, the Register, Assistant Register, or Clerk with whom the same is entered must select the name of one of the Masters residing in that city, by lot, to be inserted therein; and if the Master thus selected be absent from the city, or is interested in the subject of the reference, or otherwise legally disqualified from executing the order, the name of another must be selected in the same manner.(*b*) If a Master's term of office expire pending a reference, or after he has advertised any property for sale, under a decree or order of the court, the court may by a special order authorise him to proceed in such reference, or to complete such sale, and pay over the proceeds thereof, and to make and file his report, within such time as the Chancellor or Vice Chancellor making such order deems reasonable, notwithstanding a successor in such office may have been appointed and entered upon the discharge of the duties of his office.(*c*) Each Master is required to keep in his office a folio register, well bound and lettered, which shall be delivered over by him or his legal representatives to his successor in office; in this register he must enter the title of all causes, and matters referred to him, and a brief memorandum of the proceedings before him on such references.(*d*)

§ 38. Vol. 1. p. 41. Expediting proceedings under the decree or order.

We have seen (vol. 1. p. 41-2.) that on a motion or petition of any party interested, the prosecution of the order or decree may be expedited, and that after summons, if the party prosecuting do not proceed with due diligence, the Master may commit the reference to any party interested. The object of this and of the other new orders is to expedite the business in the Master's office, to give the Master a new and efficient control and direction of the proceedings. Formerly he proceeded to execute the directions of the court only upon

(*b*) The above is added to the 99th Rule, as a part thereof: by order of 23d April 1830.

(*c*) Sess. 53. ch. 12. p. 10. Act of January 25, 1830.

(*d*) R. 9.

CHAP. II.

the application of the complainant, or of some other party authorised by the court to make application to him; the parties taking their own time for every step, and the Master having no power to direct, or expedite their proceedings.(e) If the interests of none but contending parties were to be attended to, they might be safely left to their own vigilance in prosecuting the inquiry before the Master; but inquiries are frequently directed, or accounts ordered to be taken which involve the interests of many persons besides the actual parties in the suit, and who in some cases, as in inquiries after next of kin or heirs at law, may not be represented at all; or as in cases of inquiries after debts and legacies may be represented by a party whose particular interest it is not to stimulate him to proper activity. In such cases the object of the court is the attainment of justice by having its directions executed, and that these directions should not be reduced to a dead letter by the default or negligence of any of the parties. To attain this end it became necessary to arm the Master with new powers.(f)

§ 40 vol. 1. p 42. & n. (6).

1. *Summons and Service.*

On leaving in the Master's office the order or ordering part as directed, not forgetting the time within which it is to be done [vol. 1. p. 41. § 38.] the next step is to obtain a summons for attendance on the day assigned by the Master. This is termed the *return* of the summons, which in every instance is now peremptory; that is, the party may proceed on it without taking out any other in case the opposite party do not obey it, for only the second or third summons or warrant was formerly deemed peremptory.(a) The summons is to be *underwritten*, that is, at the foot or corner of it, the occasion or purpose for which it is taken out must be shortly stated; thus, in the instance of the preceding decree or order, it would be, 'at which time' (viz. the day and hour inserted as fixed by the Master) 'the Master will take into consideration the matter of this decree,' (or 'or-

1. Summons and service See form Hoff. Mast. appx. No. 1. No. 2 Affidavit of service on law partners of Solicitors absent from office. No. 3. Affidavit by clerk of service on clerk in absence of Solicitor. No. 4. Do. of service on

(e) This is still the case in the *Examiner's* office.

(f) 2 Grant.

(a) R. 104. See vol. 1. p. 43.

law partner, on Attorney in same office, on clerk of Solicitor, on defendant by affixing.

der.')(a) In general there are some papers or documents left in the master's office to be proceeded upon under the decree or order, for it is seldom thought proper to leave the order until prepared to proceed; for doing which some document, or other, must be necessary; at least so it was until the recent orders,(c) which seem to point out a preliminary attendance on the Master before any papers are left; but when papers *are* left, the opposite party may take copies, and then the under-writing is 'on leaving,' or, 'the complainant' or 'defendant' 'has left' &c. describing the documents. This summons or '*warrant on leaving*' as it is called, is *notice* to the adverse party to take a copy. The *serving* of the summons is effected by making a corre*t copy*, and delivering it(d) to the Solicitor or party showing the original; or by affixing, as in other cases. [see vol. 1. ch. 2. § 13. and *ante* same ch. and §.] To expedite copies, especially where there is occasion in suits to serve *numerous* summonses, blank forms are used to save copying, and are to be had at law stationers. In using they are to be altered if needful, as the Masters' forms are not all precisely alike.(e) The computation of the time of service is one day inclusive and one exclusive; and if the time expire on Sunday, the whole of Monday is included [vol. 1. p. 36. and *ante* p. 52.] Thus on a two-day service [vol. 1. p. 42.] before the day of attendance, the service on Monday must be for Wednesday, Wednesday for Friday, &c. but a summons for a *Monday's* attendance must be served on the preceding Friday, not Saturday. When the summons is served, the clerk or person serving it should make a memorandum of the service upon the original he keeps; for there may be occasion for his being *sworn* to the service be-

(a) State in the underwriting the general object of the reference, as 'To settle the form of the conveyance referred to in the said order,' or 'to ascertain the amount due on the several mortgages set forth or referred to in the pleadings, and the order of priority in which the same ought respectively to be paid,' 'to proceed upon the complainant's charge: and at which time the defendant is required to bring in his discharge.' Take to the Master [see vol. 1. p. 41. § 37.] or obtain from him the summons or summonses, who will fix the time according to the distance of the parties, [vol. 1 p. 42.] and will sign the summons. Then fill up the printed copies signed by the Master, and serve them.

(c) R. 100. 102. *ante* vol 1. p. 42.

(d) 1 Grant 254-5. 2d ed.

(e) ib.

CHAP. II. fore the Master, to justify the Master's proceeding ex *parte* in case of neglect of attendance by the adverse party, which ex parte proceeding was formerly (prior to the recent order making every summons or warrant peremptory) never without a *peremptory* warrant first taken out and served, viz. the second or third warrant.(*a*)

No. 2. *Affidavit by Solicitor of Service of Summons on Law Partner.*

(See Title, beginning and forms of other Affidavits of Service, § 7. 13. 17. 32.) City and County of New-York, ss.: G. W. S. Solicitor for the complainant in this cause, being duly sworn, doth depose and say, that he did, on the —— day of —— one thousand, &c. personally serve on A. S. G. Esq. who appeared in proper person in the above cause, and who is the Solicitor therein for H. B. L. and A. E. his wife, two of the defendants therein, a summons (and underwriting) in the above cause, of which the annexed summons (and underwriting) is a duplicate (*or* that he served a true copy of the annexed, *or* within summons and underwriting upon ——, by delivering the same to ——, at the same time showing the original hereto annexed, (*b*) *or*, that on the day and year aforesaid this deponent did personally serve on B. R. Esquire, the law partner of J. D. Esquire, the attorney of the United States (defendants in said cause) for the southern district of New-York, in their office, and during the absence of the said J. D. therefrom, another *summons* in the above cause, of which the annexed is a duplicate. That on the day and year aforesaid this deponent did personally serve on G. G. Van W. Esq. the law partner [*ante* p. 39.] of T. L. W. Esq. who is the Solicitor for S. F. L., J. J. L., &c. *six* of the above defendants, in their office; and during the absence of the said T. L. W. therefrom another summons in the above cause, of which the annexed is a duplicate. And this deponent further saith, that the bill of complaint in the above cause has been taken as confessed against P. S.,

(*a*) 1 Grant 255. 2d ed.

(*b* See form of affidavit o service by copy, Hoff. Mr. appendix No. 2. But perhaps each summons should be signed by the Master.

T. A. K. and M. S. respectively, neither of whom has appeared by a Solicitor in the above cause to the knowledge or belief of the deponent. (Signed) Sworn, &c. [§ 8.]

No. 3. *Affidavit by a Clerk of Service on a Clerk of the Solicitor.*

(Title, &c. as before) ——ss.: F. B. C. student at law in the office of G. W. S. Solicitor for the complainant in this cause, being duly sworn, &c. saith, that on the ——day of—— he did personally serve on Mr. P. a clerk in the office of C. G. Esquire, Solicitor for the above defendants, 'The York and Jersey Steam Boat Ferry Company,' and F. B. Jr. an original summons similiar to the one annexed, the said C. G. being absent from his office at the time of said service. (Signed, sworn, &c.)

No. 4. *Affidavit of Service on an Attorney in Same Office, or a Clerk, or by Affixing.*

Title, &c. as before) ——, and saith, that on, &c. this deponent served on W. P. H. Esq the Solicitor for defendants, The New-York Dry Dock Company, a summons, of which the annexed is a duplicate, by delivering the same to C. W. Esq. the law partner of the said W. P. H. in their joint office, during the absence therefrom of the said W. P. H. And this deponent further saith, that on the same day and year he served a like summons upon P. T. R. Esq. the Solicitor for the defendant W. S. B. by delivering the same to P. R. Esq. who is an attorney in the office of the said P. T. R. and receives papers for him. And deponent further saith that, on the same day and year he served a like summons upon J. A. S. Esq. the Solicitor for the defendants P. S. & E. his wife, by delivering the same to a clerk in the office of the said J. A. S. during his absence therefrom. And deponent further saith, that on the same day and year he served a like summons upon W. S., H. C. S., J. V., L. P. & N. L. five of the defendants in this cause, by putting up [see *ante* p. 75. and vol. 1. p. 25] the said summons in a conspicuous place in the office of the (Assistant) Register (*or* clerk of the —— circuit) of this court. (Signed C. W. Sworn, [§ 8.] &c.

CHAP. II.

§ 41. Vol. 1. p 42. How reference speeded after summons by any person interested, or who may apply for leave to attend. Form of order for this purpose: whence the points for drawing a petition may also be taken.

Where the plaintiff becomes a *sole actor* in the proceeding, and is bound to procure the Master's report within a given time (as on a reference of an answer to an injunction bill, for impertinence, [see vol. 1. p. 291. ch. 8. § 56. and *post* same ch. and §.] the order for reference, being a dilatory proceeding, if not acted upon within the time required by the rule of court, will on motion be discharged with costs.(*a*) But in cases where the complainant is not a sole actor, and neglects to proceed [vol. 1. p. 42.] we have seen that the reference may be committed to any party interested. A purchaser of the interest of a party in a suit may be permitted, on petition, to attend the Master in making enquiries under the decree. The order in such a case was, 'that the petitioner be at liberty to attend the Master upon the several enquiries directed by the said order of (*date.*) And it is ordered, that the Solicitor for the plaintiffs do, from time to time, give notice to the petitioner of all proceedings to be had and taken in the said Master's office, and otherwise in and about the suit, until the further order of this court, the petitioner, by his counsel, undertaking to pay the costs of all parties, and of the assignees of the plaintiff, W. T., of this application, to be taxed, &c. and that the same be paid by the said petitioner; and this order is to be without prejudice to the rights of the parties in this suit, and also without prejudice to the rights of the assignees of the plaintiff to dispute the validity of the assignment in the said petition named.'(*b*)

§ 42. Vol. 1 p. 42. 1. Return of summons for attendance, regulation of future proceedings. Mode of putting the Master in possession of the subject matter of the reference:

Return of Summons and Further Proceedings.

1. On return of summons, the Master will proceed to regulate future attendances and proceedings in the matter referred to him, agreeably to the new rules. [vol. 1. p. 42-3, &c.] The mode, on delivering the copy of the order, or on the return of the summons for attendance, of putting the Master into possession of the facts and circumstances of the matter referred to him, may be by deposit of documents, state of facts, charges, or proposals, supported by affidavit, or subsequently sustained by testimony upon written or oral

(*a*) 13 Price 451. (*b*) 1 Jacob 159.

interrogatories, [vol. 1. p. 43. § 46.] as hereafter mentioned. Where matters referred *originate* in interlocutory motions or petitions, the Master, in evidence, proceeds on *affidavits*, not interrogatories. But after a decree he cannot receive affidavits in evidence, but can only proceed on *interrogatories*, or *viva voce* [§ 46.] as the decree always directs where any party wishes to prove a matter before him; unless by consent of the other side.(*a*) On a reference under a decree and where parties were rected to be examined on interrogatories, the Master proceeded upon affidavits (the deponent being in a foreign country); upon motion, the court directed him not to proceed upon the affidavits, but with liberty, under the circumstances to apply to the court, if by death or otherwise it became impossible to obtain, under a commission, the evidence of those who had made the affidavits.(*b*) Depositions in a former cause between the same parties, if offered in evidence to the Master, may be received by him, if he think them evidence.(*c*) But affidavits required by the Master in proceedings before him, being sworn to usually before him, are then left in his office, whence copies may be taken by any of the parties.(*d*)

when the Master proceeds on affidavits.

English warrant equivolent to our summons.

See form of warrant *post* note(*e*) and 1 Hoff. Mast. p. 2. and appx. Number 1.

2. Course of proceedings in Master's office. See marginal notes and references, *post*.

Before we trace the proceedings further in the Master's office, it may be remarked that copies of all proceedings at any time filed in a cause must be mutually served by and on the parties who have appeared. [vol. 1. p. 233. 25. 42.] Hence all papers, except such as are intended to convey information to the Master himself, ought perhaps to be served. And it has been the practice on leaving charges or discharges, for instance, in the Master's office, to serve a copy with notice on the opposite Solicitor.[*post* § 50.] It may also be observed, that heretofore, especially by the English course of practice, every step taken from time to time was preceded by additional summonses, or the English warrants,(*e*)

(*a*) 1 Grant 259.
(*b*) 3 Mad. 494.
(*c*) 3 Atk. 523. *See ante* vol. 1. p. 20.
(*d*) Harr. Grant.
(*e*) In England the Master's warrants on leaving a *state of facts*, and to proceed on them are, for example, thus:

In re, P——, a Lunatic,

By virtue of an order of reference, I do appoint to consider of the matters thereby to me refer-

CHAP. II. which are in effect the same, and might, it is conceived, be adopted as a more concise form; the numerous summonses thus required may be rendered unnecessary, if the Master, as he may, under the new rules [vol. 1. p. 42. § 43.] *if he think it expedient*, on the return of the summons, or at a subsequent attendance, and from time to time, fix the time within, or at which any proceedings before him shall be had, and proceed de die in diem, or by adjournment. In case the Solicitor has occasion in the progress of proceedings in the Master's office to take out warrants (summonses) without the Master's special direction, supposing him at liberty, which is very questionable, to do so under the new rules,) it is then to be recollected, that at the expiration of every summons (or warrant) he is (according to the English practice as to warrants) entitled to take out another, which he will do if he is prepared to proceed; and if the other parties have obtained, or have had sufficient time to have obtained, their copies, unless he choose to allow them more time. In these cases such subsequent summonses (or warrants) are to be *underwritten*: 'To proceed on,' &c. (whatever may be the subject of the reference describing it,(*b*) as will be found under various references in the course of proceedings hereinafter directed. But where some or one, not all parties, attend the Master, it will be further recollected that the Master may proceed *ex parte*. [vol. 1. p. 43.] The practice (in England) is to wait for the opposite Solicitor half an hour after the *hour* usually assigned on each warrant, in case he should not have punctually attended. If in that half hour the adverse party do not come, another warrant may be taken out,

red on *Saturday* next, at 9 (this hour is nominal, and always inserted in the first warrant on *leaving* any papers) of the clock in the *forenoon*, at ——, at which time and place all parties concerned are to attend. Dated, &c. (Master's name.)

(Underwriting.) On leaving state of facts, and proposals of Mrs. A B. for committees of the person, and affidavits in support.

(Endorsed.) Left copy hereof at Mr. ——'s office, this —— day of ——. I. T. The succeeding warrant is for another day, and underwritten thus: 'To proceed on proposals for committees of the person.' The same memorandum endorsed: and the service is on the Solicitor. 2 Grant 464.

(*b*) 1 Grant 2d ed. 256.

but subject, now, to the Master's proceeding *ex parte*, as mentioned. The hour is frequently and necessarily exceeded, especially in material or heavy suits, or amicable ones, and two, or even three hours allotted, and additional warrants taken out accordingly. Business is thus despatched when the Master's engagements and other circumstances admit of it; all which is preconcerted and arranged.(c)

2. The following sketch will exhibit an outline of the routine of business in the Master's office, under the recent orders, which are similar on this subject both in England and in this state. As it is impracticable(a) to detail all the inquiries and directions of every decree in every different suit, of which, as may be supposed, the variety is endless, it is therefore intended now to select, as most comprehensive and useful, the usual directions and inquiries arising out of a suit for the administration of a testator's assets, and the distribution and management of property under wills.(b) The explanations incident to these proceedings will afford such a view of, and acquaintance with, the business to be carried through a Master's office, as to apply, with only necessary and obvious variations, to allcauses wherein the Master's interference is required.

2. Routine of business in the Master's office: Example taken from proceedings in a suit for administration of assets of a testator, distribution and management of property under wills. See usual form of a decree in a bill for administration of assets. Hoff. Mast. 180. See a form *in extenso*. 4 J. Ch. 646-9. Eq. Draft. 647, &c. see order to take and state partnership accounts. Blake 226.

On leaving, therefore, in the Master's office the ordering part of the decree, the Solicitor will then of course place himself under the Master's direction, so far as is required by the new orders, [vol. I. p. 42-5] especially that in relation to the regulation of future proceedings: [ib. § 42.] Subject to which, it may be laid down that the first step in the Master's office is to bespeak the usual *advertisement for creditors*.(d) This he or his clerk will prepare and deliver to you signed by the Master. The papers in which it is to be inserted, and the period of the insertion, has been usually left by the decree to the discretion of the Master,(e) and after the

See form of first and second advertisement. Hoff. Master 381. appendix. No. 56.

(c) 1 Grant 258.

(a) Observes Mr. Grant, vol I. p. 383: of whose Practice, 2d ed. 1829, I have already made, and shall continue to make, a copious use, so far as the English practice is applicable to our own.

(b) See 5 J. Ch. 441. 4 J. Ch. 619. 651. Hoff. Mast. 180-203. See Johns. Dig.

(d) See 4 J. Ch. 619.

(e) 4 J. Ch. 647. Hoff. Mr. 181.

CHAPII.

lapse of a month or six weeks, or when the proceedings were about to be brought to a close, or when in a state of forwardness, another and *peremptory advertisement* is to be given(*f*) as hereinafter mentioned. But by the revised statutes, whenever a bill is filed, for relief of creditors generally of any person or of any estate, or for the benefit of any other persons than the complainants, who will come in and contribute to the expense of such suit, *every order* which may be made thereon, requiring such creditors or other persons to exhibit their demands, must, in all cases, be published once in each week, for at least *three weeks*, and as much longer as the court may direct, in the state paper, and in a newspaper printed in the county where such demands are required to be exhibted.(*a*) In the present instance, therefore, a notice from the Master of the time and place for the creditors to appear, accompanied by the order in the given case, being published or put in *train* for publication, the Solicitor will then (but subject to the operation of the new orders, just adverted to) proceed to such other direction of the decree, as an attentive perusal of it, and consideration of its whole scope, and the general objects and purposes of the suit, may appear to render most necessary, or most convenient and practicable, in point of order, for carrying on the suit. With that view it will be found serviceable, and is usual to mark in the margin of the decree, or even on a separate paper, or both, an accurate and short abstract of the several heads, and directions, for more convenient reference. In the kind of suit wherein the decree is now supposed to be under consideration, viz. for the administration of assets under a will, (and it is to be remembered that the decree is always to be complied with, and its directions carried into effect,) the next step may probably be [see vol. 1. p. 42-3. § 42-5.] to take out the necessary summonses for the defendants to bring in their *accounts*.(*b*)

Publication of order.

3. Further proceedings; consideration of other directions of the decree, summons for defendants to bring in their *accounts*.

(*f*) 1 Grant 384.
(*a*) 2 R. S. 183. § 106.
(*b*) 1 Grant 384.

The complainant's Solicitor must be supposed to take the lead in prosecuting the suit in the *Master's office*. In such case the defendant's Solicitor will follow the requisitions made upon him by the service of the summonses for the various purposes of the suit: but will also not omit to mark the instances in which, in case of dilatoriness on the complainant's part, the defendant may urge him on by summonses, or application to the court. There is, perhaps, *no* proceeding in which a defendant is interested, in which he may not avail himself of that sometimes very important privilege. But the new orders, as before noticed, [vol 1. p. 41-3. § 38. 41-45.] will now be attended to in this respect; and as also making every summons or warrant peremptory. The *accounts*, in an executorial suit are usually one of the earliest proceedings in the Master's office, as has been stated; the summonses for which if served are to be attended to. The defendant's Solicitor, however, will, (perhaps without waiting long for the complainant's summons, should he be dilatory) carry in the accounts required under the new orders, having prepared them in the usual form of an account current, Dr. and Cr.(*a*) and verified by affidavit in the forms hereinafter given; [*post* § 50.] copies of which are usually, and perhaps must be [p. 101.] served on the complainant's Solicitor.

Defendants' proceedings at this stage of the reference—their accounts in form of Dr. and Cr.

When carried in with the affidavit sworn by the defendants to verify the payments [*post* § 50.] copies (if not previously served) will be taken by the complainant, who will investigate and compare them with his documents, to ascertain what has been received by the defendants, or come to their hands, or which but for their wilful default they might have received. [see *post* § 50.] Should the accounts first carried in not be deemed sufficient by the complainant, he will then, under the new order, [vol. 1. p. 42. § 42. p. 45. § 50.] exhibit interrogatories for the defendant's examination in respect of such supposed insufficiency, the form, mode of preparing, settling, under the direction of the Master and objecting to which will be pointed out. [*post* § 46.] Whenever either, in the first instance, or under interrogatories, the accounts get before the Master, and are to be proceeded

Proceedings resumed. Interrogatories for insufficiency of the accounts brought in.

(*a*) 1 Grant 424.

CHAP. II.

State of facts.

upon, the mode is also subsequently directed. [*post* § 47.] If in this stage of the cause there arise any *special matter* for the notice of the Master, preparatory to the court's direction thereon, this, in such case, can only be effected by a *state of facts*, which when prepared, is left in the office, summonses taken out, as in other cases, and the statements verified; and then will serve as materials for the Master, either to include in his general, or make a separate report. [See as to the state of facts, *post* § 50, 51.] When the interrogatories are settled and allowed, [*post* § 46] you will proceed if necessary to compel an examination. The acceleration or delay of suits in Chancery depends, as must be imagined, upon innumerable incidents—many inevitable; introducing changes which create new interests, new parties to be sought out, sickness, death, absence, &c. &c. Some delays, certainly, are attributable to tardiness or inattention, scarcely to be justified, and some to almost unavoidable courtesies. Circumstances and considerations must guide the Solicitor in the latter cases, and enable him to draw as just a boundary line as may be. Generally speaking, however, the rules of practice, and the provisions of the court, will second his attention to his client's interests in this respect: and the new orders also, to the extent they go, *decrease* the former causes of delay. Thus in the present case, should the executors, from whatever cause, be slower than could properly be allowed, in preparing and putting in their answer and examination, the *compelling process*(*a*) must be pursued [See § 46-8.] and defendants, if it is necessary, committed. But instead of this unpleasant proceeding, it may be, and perhaps generally is, that defendants render it unnecessary, by paying at least *sufficient* attention to the requirements made of them, and that their Solicitor will, therefore, intending to put in the examination as quickly as possible, apply to the Master intermediately, on one of the summonses taken out, for *time* to put in their examination. [see § 47.] Perhaps, on account of the defendants, one or all of them, residing at a distance from the Master, a *commission* for taking their examination may be neces-

Examination and compelling process.

Commission for taking examination of some of

(*a*) 1 Grant 385-6.

sary, or at least desired by them; in which case, the Master's *certificate* for commission will be obtained, and the commission executed as prescribed [*post* § 43.] The interrogatories for the examination of the executors, it has been presupposed, have been allowed, and not excepted to as settled by the Master, as they may be, and the court's opinion taken on such exception. [*post* § 47.] But whether with or without that interruption, the examination is to be put in by defendants in the form and manner directed. [*post* § 46-47.] The examination, unless properly *prepared*, may be liable to exception for impertinent matter, and be disposed of as all other proceedings before the Master are, when exceptionable for impertinence or scandal. [see *post* § 49. vol. 1. same §.] On the coming in of the examination or examinations, (for executors, if they please, may put in separate and not joint examinations, from various motives or occasions, for instance, if they live wide asunder, or have acted separately in general,) you obtain an office copy of the examination whether it was before the Master or by commission, or both. The Solicitors of any interested parties may also take such copies. From this examination the insufficient accounts brought in are to be corrected, and all the facts ascertained for which the interrogatories were exhibited. When the examination is in fact brought in, and your copy obtained, it should be examined with the same care as an answer, to see that you have obtained all the information you want, or have right to expect under your interrogatories. It is very possible the examination, like an answer [ch. 8. § 25. 55] may be *insufficient*, and therefore unsatisfactory; in which case exceptions may be filed with the Master, and without any order of reference, disposed of as is directed [*post* § 49. and vol. 1. same §.] It may have been deemed necessary by the complainant's Solicitor, in order the more accurately to judge of the sufficiency of the examination, as well as for other purposes, to have required the production of books and papers, and the depositing of them in the Master's office. In such case you will proceed as directed, [*post* § 44] should the Master's decision be in favour of the sufficiency of the examination, he will report or rather give his *certificate* accordingly. If complainant's Solicitor

defendants at a distance from the master.

Examinations prepared and brought in, pre-supposing that the interrogatories had not been excepted to: copies taken: the examination excepted to for impertinence. insuf. ficiency, &c.

Exceptions for insufficiency. Production of books and papers. Decision of the Master on the exceptions: exceptions to his certificate of the sufficiency or insufficiency of the examination.

CHAP. II.

mean to acquiesce in that decision, he will then proceed with the cause as hereafter explained, on the examination being eventually received, and then need not trouble himself with taking up the certificate of the Master and filing it, which the defendant's Solicitor will probably do. But if you are not satisfied, but mean, by *exception*, to take the court's opinion, you will proceed as also directed. [*post* § 44.]

Further examination: Exceptions to master's certificate of the insufficiency of the former. Compulsory process for further examination.

If, however, instead of originally reporting or certifying the examination to be sufficient, the Master should be of the opposite opinion, he will then certify (and his certificate will, of course, be obtained, and filed) the particular interrogatories, or parts of interrogatories, he conceives to be not answered. This certificate may also be excepted to by defendants. [*post* § 43. 49.] Having obtained your office copy, to ground your compulsory proceedings for enforcing defendants' *further* examination, you may first, as matter of usual courtesy, take out a summons, at a reasonable return, for defendants to *bring in* their further examination; but you would be strictly regular in omitting that. If, indeed, the examination should be brought in, in consequence of it, the expense of ulterior process would be avoided; but if not, and unless defendants except to the report as before mentioned, or obtain further time, and then also on their further neglect, you will obtain, as before, the Master's *certificate* of default, and proceed to compulsory process for commitment, until defendants clear their contempt by answering and paying the costs. Should it appear necessary, on the examination being reported insufficient, to add new interrogatories, an order may be obtained for that purpose on special application, with notice, [but see § 50.] and that defendants may answer both sets at the same time.

Fresh interrogatories.

Second advertisement for creditors: Creditors' remedy who neglect to appear.

When a month or six weeks have passed after the insertion of the *first* advertisement for creditors, the *second advertisement for creditors* (according to the English practice) is then obtained from the Master's clerk, and proceeded with in the same manner as the former. This, though called the *peremptory* advertisement, from the use of that term in it, and its general import, is, nevertheless, not conclusive upon creditors; for notwithstand-

ing the time is limited by it for their bringing in and substantiating their claims before the Master,(a) and though the language of the decree where an account of debts is directed is, that those who do not come in shall be excluded from the benefit of that decree; yet the course is to permit a creditor, he paying the costs of the proceedings, to prove his debt, as long as there happens to be a residuary fund in court, or in the hands of the executor, and to pay him out of that residue. If a creditor do not come in till after the executor has paid away the residue, he is not without remedy, though he is barred the benefit of that decree. If he has a mind to sue the legatees, and bring back the fund, he may do so; but he cannot affect the legatees, except by suit; and he cannot affect the executor at all. In a suit however for administration of a testator's assets, where the Master pursuant to the decree directing, among other things, the usual accounts of testator's assets and of his debts and legacies, reported that several creditors had come in, and proved their debts to a certain amount; whereupon an order was made directing the payment of those debts, which were accordingly paid. And after a decree on further directions ascertaining the rights of the parties, providing for payment of costs, reciting that the creditors of testator had been paid their respective debts set forth in the schedule to the report, ordering the residue of the fund in court to be apportioned among the other legatees, sanctioning a prior voluntary payment by the executor in discharge of certain legacies, a creditor, on petition, obtained leave to prove his debt, and the Master reported it due; but mean time the fund having been apportioned, and part paid over, and the remainder carried to the account of particular legatees, (minors and absentees) it was held that the creditor was entitled to receive, out of the funds of legatees so remaining in court, not the whole of his debt, but a part only, bearing the same proportion to the whole, as the legacies given to those legatees bore to the whole amount of the legacies given by the will. It was accordingly referred to the Master to ascertain the contributive portion of the debt and interest: directions then given for raising out of the sum standing to each account its contributive proportion, the creditor had liberty to apply to

(a) 1 Grant 390.

CHAP. II.

the court, as he might be advised, against such of the legatees as had received payment, and that he and the legatees out of whose fund he had been partially paid, might apply according to their respective rights and interests, with regard to the testator's estate remaining outstanding, as and when the same should be gotten in and received.(a)

Production of books, preparatory to taking the accounts. Compelling production. Inspection

If it has not been found necessary until about the period when the accounts are to be taken, to call for the *production* of *books*, *papers* and *writings* in the custody or power of any party in the cause, pursuant to the decree, [*ante* § 36. No. 2.] this may now be done and enforced in the manner hereafter directed. [§ 44.] It may happen that the production may not be a satisfactory one to the complainant's Solicitor, though it may be to the Master. In such case, the remedy would be an order to be obtained, on motion of course, that the Master may receive interrogatories; or, rather, that the complainant may be at liberty to file interrogatories for the examination of defendant or other parties. And if the Master, construing a decree that production could not be enforced, should refuse his certificate of default, recourse must be had to a similar application for an order upon the party to produce the deeds or documents wanted. [§ 44. and ch. 8. § 51. 53.] From the *affidavit* accompanying the deeds, &c. when left, (and of which affidavit you may, of course, take a copy as soon as you are informed of it by the defendant's summons served on your Solicitor,) you will learn what deeds, &c. are so left. Should it be necessary to inspect and examine any of them, a summons must be taken out for the purpose, underwritten, 'to inspect the (whatever it may be,) left by defendants. If the opposite Solicitor do not attend the summons, (all summonses or warrants being now peremptory [§ 45. vol. 1.] the inspection will be granted on the usual proof of service on defendant's Solicitor, or his agent. [§ 13.] The decree is not satisfied by the mere *production*; the documents must be *left*(b) under the directions of the Master, if he deem it necessary, pursuant to the new order. [See § 44. *post* and vol. 1.]

(a) Gillespie v. Alexander, 3 Russ. 130.

(b) 1 Grant 391.

Accounts, taking them: Brought in by way of debtor and creditor.

Any information you may have gained of the testator's affairs, or of the property of which he died possessed. from your inspection of deeds, books, and papers, is to be added to what you derive from the defendant's answers, particularly the schedules, and from the examinations, if interrogatories have been exhibited, as already stated. And although the *mode* of taking executor's accounts, for the purpose of bringing all the property within the protection of the court, is not now, by a *charge* or charges carried in by the complainant, and a *discharge* or discharges carried in by the defendants, but more summarily by debtor and creditor *accounts*, under the new orders, as may be seen [*post* § 50,] whereby the proceedings in the Master's office, on this head, are, perhaps, simplified and shortened; yet several observations, which were considered useful under the former mode of executors, or other parties, [of whom see *post* § 50.] accounting before the Master, are equally applicable to this; and especially the *guide* for investigating the new debtor and creditor account of executors, or others, when brought into the Master's office, must be the same as before, for ascertaining their fidelity, viz. all information, however gained, of the testator's affairs, (or of any other pecuniary affairs, in any sort of suit in which there are *accounting parties*,) whether from the examination of deeds, books or papers, or otherwise, as above stated. And the new order as is seen, [§ 50.] directs the mode of proceeding in case the accounts first brought in are not satisfactory. It may further be adverted to as probably useful, in this connexion, to turn to the subject of assets; and it may also be usefully, though by anticipation, observed, that the *result* of these accounts is, the *ultimate balance*; which if in favor of the estate, is to be paid into court, or (as is sometimes the case) if in favor of the executors, or other accounting parties, is to be paid to them, as creditors, under the order for further directions after the Master's general report. On this head also may be further remarked, as a guide for seeing that the accounts of the executors or accounting parties are duly arranged, that if the Master is by the decree directed to distinguish what of the estate is principal and what interest, it is

CHAP. II.

to be seen that the accounts furnish the means of making that distinction; and that all monies due to a testator at his death are, for this purpose, principal, and that the interest intended by the decree is what is to be calculated on securities, and has accrued *since* his decease, as well as the interest of any sums which the executors themselves may have put to interest out of the testator's personal estate since the same period.(*a*)

The accounts being brought in, in the form [§ 50.] of debtor and creditor, (*one* account of the *personal* estate, and *another* of the rents and profits of the *real* estate, if any,) and which if necessary the complainant's Solicitor will, as in the case of the examinations, hasten by a summons or summonses, in the usual manner, he will (unless previously served with copies [§ 50.] then take copies of them from the Master's clerk. That side of the accounts which consists of receipts, or profits, with which the executors, or accounting party, charge themselves, is to be compared with every document and source of information in complainant's possession (including the *examination*, if interrogatories have been exhibited) which *can* show the items, and amount with which the accounting party *ought* to be charged, comprising not only monies, but any specific articles of property which may have come to their hands; and if any deficiencies, or omissions, or errors, are found, the new order [§ 50. vol. 1.] points out the remedy, by interrogatories as notice [*ante*, and § 47.] if the matter cannot be otherwise and more easily rectified. The interrogatories mentioned in that order must be drawn by the Solicitor, but settled by the Master, as in other cases; a summons on leaving, and another to settle them, must be taken out, and served on the opposite Solicitor, and the latter attended as usual, with the usual power of taking exceptions to the Master's certificate of allowance. When, however, by whatever means, the interrogatories are ultimately settled, and acted upon, (and if a commission be necessary for this purpose, the Master grants his certificate of its necessity, upon which an order is to be obtained and a commission issued as directed *post* § 43.;) the examination, when brought in on oath, will serve to enable the Master to correct the

(*a*) 1 Grant 392. See authorities cited, *post* § 50.

account accordingly. And with respect to the *creditor* side of the account [§ 50.] that must, on the attendance before the Master, under summonses served to '*proceed on the accounts*,' be proved, item by item, by proper vouchers, except as to sums of twenty dollars or under, and not exceeding in the whole five hundred dollars, which will be allowed on the general oath.(*a*) The mode of proceeding is, that (when before the Master) the complainant's Solicitor reads from his office copies of answer and examination, and from any other documents he may have, of sufficient authority, all the items which he conceives ought to form the *debtor side* [§ 50.] of the account, in which the Master accompanies him, marking in the account every item *admitted* on all sides, as the Solicitors will also do on their copies of the accounts. It must necessarily sometimes happen, that doubts and dissention will arise upon some items composing, perhaps, *either* side of the account; in such cases, the controverted item is queried by the Master, in the margin, (and by the Solicitors in their copies,) and a summons or summonses must be taken out and served, for the purpose of attending the Master again, upon such queried items, when all parties have prepared themselves either for discussing it further, or finally *settling* them before the Master.(*b*) Or, the Master ought, in the first instance, to ascertain from the parties or their counsel, by suitable acknowledgments, what matters or *items* are agreed to or admitted; and then as a general rule, and for the sake of precision, the disputed *items* claimed by either party ought to be reduced to writing by the parties, respectively, by way of charges and discharges, (or now by Dr. and Cr.) and the requisite proofs ought then to be taken on written interrogatories, prepared by the parties, and approved by the Master, or by *viva voce* examination, as the parties shall deem most expedient, or the Master shall think proper to direct, in the given case.(*c*) Thus, *that* side of the accounts is to be gone through, which will take longer or shorter time, according to circumstances, but no more summonses should be taken out than absolutely neces-

(*a*) See Remsen v. Remsen, 2 J. Ch. 495. 501.

(*b*) 1 Grant 393.

(*c*) 2 J. Ch. 501-2.

CHAP. II.

sary, as otherwise they may not be allowed. When completed the Master will mark it, as allowed, at the foot with his initials. If executors account separately, as they may, and sometimes do, the proceeding is similar in each case: to go through the *other* side of the account, similar proceedings must be had, and a similar mode pursued; only, that the items, as has been observed, will be proved by vouchers, when exceeding twenty dollars in amount; but it does not follow that all payments will be allowed, if they are disputed as improper. That may be the subject of interrogatories.(*a*) For more effectually despatching business the Master may now, without an order, and at his own discretion, proceed *de die in diem* [§ 43.] without any intermediate summonses, where he conceives any business to require that extraordinary attention.(*b*) A defendant's *admission* in his answer or examination may be read against him in support of the debtor side of the account, if rectified by the complainant, subsequently to being brought in; but that may be obviated, and introduced into the creditor side of the account, by the defendant showing an immediate application of money on receipt of it, as one transaction, not by distinct items.(*c*) A co-defendant, if interested in taking the account against the executor, may obtain an order for attending the Master [See *ante* § 41.] in taking the account.(*d*) Various occasions may happen according to the circumstances of a suit, for making it desirable to some of the parties to have a separate report of *debts and legacies*, or other matters. Separate reports are resorted to for the purpose of accelerating [See § 51.] any intermediate and important matter in a cause, without waiting for the *general* report. The Master is by the new orders [§ 51. vol. 1.] enabled to make such report

Separate report of debts and legacies. For infant's maintenance, guardianship, &c. State of facts, or state of facts and proposal, as a

(*a*) Yet the Master has been directed to allow, upon affidavit, items, the vouchers of which had been impounded by the Ecclesiastical Court. 1 Grant 394. citing 8 Ves. 146. See as to accounting, authorities cited *post* § 47. 50. and vol. 1. p. 44. 301. 303.

(*b*) 1 Grant 395. 2d ed. According to the former practice (in Eng.) when either party wished to urge the progress of the suit, the course was, to take out an order for the Master (which was *discretionary* and not *imperative* on him) to proceed *de die in diem*, 2 Grant appx. 36. n. 1st ed.

(*c*) 1 Grant 394. c. 19 Ves. 582. See § 47.

(*d*) Ib. c. 16 Ves. 49.

preliminary to such report. Terms of the decree as presupposed.

whenever he deems it expedient, the *costs* of which are in the discretion of the court; and if he make a report of the first mentioned description, (debts and legacies,) he is at liberty to make such certificate as he thinks fit, with respect to the state of the assets; and any person interested may thereupon apply to the court, as he may be advised. This separate report of debts and legacies, when wished for by any party, will, perhaps, be thus obtained under counsel's advice, in some circumstances; but may be resorted to as a preliminary step for a creditor (a mortgage for instance) being paid off, either, on his own, or on that of any more interested party, for the exoneration of the estate. Another frequent and very proper occasion of a separate report is, where there are infants, or an infant, complainants in a suit, and their *maintenance* or *guardianship* forms a prominent part of the proceedings. The Master may, on some occasions, suggest the propriety of this measure himself, though generally, it is to be supposed, emanating from the Solicitor. And a state of facts may, in some instances be necessary, to bring the subjects fully before the Master, if his knowledge of the suit, and the Solicitor's oral communications, are not sufficient. States of facts, it may here be observed, [See examples of them *post* § 50,] are the documents by which information is laid before the Master, to enable him to decide upon any question to be resolved, or measure to be taken. But the present order [§ 51.] with respect to *infants*, in *this* case saves time and expense, by rendering a previous application to the court (to authorise the Master to make a separate report) unnecessary, and therefore enabling the Solicitor to proceed at once before the Master, as he *used* to do after obtaining the necessary *order* to authorise the Master to take cognizance of this application, where such authority was omitted to be given by the decree on the hearing of the cause, or where the measure becomes desirable and necessary *before* a decree. The Solicitor, therefore, in prosecuting this object of obtaining a guardian and maintenance for an infant, lays before the Master, in a *state of facts and proposals*, such particulars as are necessary for informing him of, and enabling him to decide upon, all the sub-

State of facts and proposals. Terms of the *decree* as presupposed.

CHAP. II.

jects, viz. whether under the circumstances the infants need the appointment of a guardian as well as maintenance, and the amount of such maintenance. The decree will, it is presumed, have directed the Master to '*inquire and state*' (supposing a father of the infant or infants to be living,) '*whether A. B. the father of the infants was at the death of the testator, and now is, of ability to maintain and educate the complainants, the infants, his infant children, suitably to their fortunes and situations in life,*' and *if he should find* '*he was not*' *at the death of the testator able to do so, then* '*to inquire and state who has maintained and educated the infants since the testator's death, and what has been properly expended, or ought to be allowed on that account, and out of what fund the same ought to be paid; and if he should find that the said A. B., the infant's father, is not now of ability to maintain and educate his infant children in manner aforesaid, then the Master is to consider and state what will be proper to be allowed for their future maintenance and education, and out of what fund the same ought to be paid.*'(*a*)

The ordering part of the decree itself being already before the Master for the general purposes of the suit, he is, therefore, prepared for the reception of papers upon this occasion. The *state of facts* must (for this and all other purposes wherein that document is resorted to) consist of such facts and information as are necessary to enable the Master to adopt your own views, so far as correct, or rectify them if erroneous, as well as to judge between you and your opponent, if you have any It must, therefore, set forth clearly the will or other title under which the infants derive their right to maintenance: especially such parts, if any, as bear particularly upon the point, such as any directions of testator on the subject; which of course in this, and all cases, will weigh with the Master. It should also state the precise situation and circumstances under which the infants have been living since testator's death, and particularly if the appointment of guardian be connected with the maintenance: showing, for instance, *why* the father (the natural guardian) either is unfit for, or undesirous of, acting in that

State of facts. What it sets forth. The will or other title, circumstances, father, amount of maintenance, property. past maintenance, expenditure. Plan.

(*a*) 1 Grant 395-6.

capacity, and his *desire* (if so) that some other individual, and for what reasons, should be assigned by the court to act as guardian on this occasion, which is all the court will do, or rather the *mode* in which the court will act under such circumstances of a father being alive. Thus much for the guardian; then, as to amount of maintenance, (which is wholly or chiefly regulated by the amount of property to which the infants are entitled; though the manner of their bringing up, and habits of life, and, if sons, their future destination, will also be taken into the consideration;) for *this* purpose your state of facts must contain a full description of every species of property under appropriate heads, personal or real, with all outgoings belonging to each; so as to show to the Master, if not the most exact, yet as correct a balance as may be in favour of the annual income. It must also set forth who has maintained the infants, and from what time, since testator's death, and show all payments made on that account, in order to their reimbursement. The health also, and any particular circumstances whatever relating to the infants, and inducing extraordinary expenditures or care, medical or otherwise, should be fully explained, if you wish for the due effect of those circumstances in determining the Master's opinion in favour of your own or your client's ideas, as to the amount of allowance for the time past, or for the time to come. If any particular plan or mode of education, or subsistence also has been meditated for infants, as suitable or necessary, or both, it should be fully developed for the Master's consideration. It is not to be expected that a reasonable and clear exposition of this sort should fail of convincing the Master of its propriety, and inducing his concurrence, though some cases are occasionally more or less complex. It is obvious that, on the part of the infants, the Solicitor, or their proposed or present guardian, will also have made the necessary calculations of annual expenditure, containing the particular charges of each head of maintenance and of education, so as to produce one total sum to be proposed to the Master as an annual allowance for the *time to come*. As to *the time past*, that has been just adverted to. A form of this kind of state of facts, with the *proposal*, may be seen [*post* § 50-1.] and which, with these remarks, and a general at-

CHAP. II.

tention to the nature of the business and the object in view, may be sufficient. It is, however, to be noticed, that this application may, very easily, not be final; but that an *increase of maintenance* will be at a future period to be applied for. In such case the same observations apply, with the variations that may be called for; and a petition will be found [*post* § 51.] for the purpose, which of course is to be followed by a corresponding state of facts and proceeding before the Master, as on this occasion. In the present, as well as in any such future application, the Master will expect all material facts, not specifically verified by any proof in the cause, to be *supported* by the affidavit of some competent person or persons, and to a certain extent, and as far as needful, such affidavit is to be, substantially at least, in the terms of the state of facts, or almost its echo. [See form *post* § 50.] This affidavit is to be sworn before, and left with the Master himself, with the state of facts, and not filed as affidavits *for the court* are. Until this be done the business cannot be proceeded in; but when it is, and both state of facts and affidavit left, you take out and serve on all necessary parties summonses on leaving, and to proceed in the usual manner; the service is on the Solicitors. *Underwrite* the summonses, 'On leaving a state of facts and proposal for the maintenance of the plaintiffs, the infants, and affidavit in support thereof;' or 'to proceed on the state of facts and proposal for the maintenance and education of the infants.' The proposal is subjoined to the state of facts, and only suggests to be adopted what has before been set forth as the proposed mode of acting both as to guardian and maintenance. As to the proceeding before the Master, on this occasion, it is like all others. You must be furnished with all necessary documents to prove your allegations; and if you meet with obstruction from opposite parties or interests, you will have to support your own claims as circumstances enable you, and the Master will decide. When the Master has so decided, he will, having approved or modified your proposals, make his *separate report* thereof:(*b*) The further proceeding is noticed [§ 51.]

Increase of maintenance.

Affidavit in support of applications. Summonses on filing state of facts and proposals and affidavits with the master The proposal subjoined to the state of facts. Proof thereon and separate report accordingly.

During these proceedings, some *creditors* may possibly have carried in their claims before the Master in

(*b*) 1 Grant 397-8.

Creditors claims brought in by way of charge, supported by affidavit Summonses thereupon. Copies served or taken. Summons thereon to proceed, proceedings.

consequence of the advertisements. To do that, the creditors' Solicitor prepares a *charge* or *claim*, and affidavit, to be sworn by their client in support of it [for each of which documents see § 50.] The *charge* is to be fair copied, either brief-wise or book-wise, as most convenient in regard to the length of the document, or as the Solicitor may prefer, and with the affidavits is left in the Master's office, and summonses taken out thereupon, served upon all the parties, or Solicitors, and proceeded in as in other cases before detailed; the Solicitor for the creditor taking care to obtain, through the medium of the Master's office or otherwise, sufficient information as to all the interested parties necessary to be served. These warrants may be underwritten, 'A. B. a (bond *or* specialty, *or*, as the case may be, simple contract) creditor of C. D. the testator, has left a charge of debt, and an affidavit in support thereof.' Of these documents you, as the Solicitor in the cause, and having the conduct of it, may of course take copies (unless they had been, as perhaps they should be, served on you, see p. 101.) as may also the Solicitors of any other parties sufficiently interested in the distribution of the assets. Following these must be the summons 'to proceed on the charge of,' &c. and served, and regularly attended in the usual manner; upon which occasion the creditor's claims would of course be examined into, as may appear to be required; and all necessary documents, such as probate of will, or letters of administration, in case of representations; and securities, such as notes, bonds, mortgages, judgments, produced for inspection, and the satisfaction of the Master and Solicitors. Sometimes these claims are open to much discussion or dispute, and take time, and many summonses to settle finally; but when finally settled and disposed of, the Master writes at the foot of the charge 'allowed', or 'disallowed', as the case may be. In the former case the creditor's Solicitor in particular will be careful that the Master marks the charge, and will subsequently attend to its insertion in the report or schedule: of which, if the claim will bear the expense, it may not be amiss for him to obtain a copy, or partial extract. In some cases of clear and undisputed debts, the creditor's bill or account of the *particulars* of his demand accompanying his affidavit,

CHAP. II.

may be dispensed with, especially if voluminous, and the Solicitor for the estate be satisfied without it; otherwise the *Master* will require it, and perhaps it should not *regularly* be waived by the Solicitor as a matter of business, though creating somewhat more expense in office copies. In case of several creditors for *small* sums, (perhaps £20 or under, or even £25 in England) uniting in one charge to save expense, there must, nevertheless, be a separate affidavit for each distinct claim. [See charges and claims, *post* § 50.] It may very possibly occur that the Solicitor in the cause may have ground for doubting the *legality* of a debt, though verified by an affidavit in support of the claim in the Master's Office; where although such affidavit is received, as *prima facie* evidence, and sufficient proof, when not contested, yet it is not conclusive. For a *contested claim* is to be investigated by the medium of *interrogatories* for the examination of the parties, as in other cases where interrogatories are applied. But if affidavits be not objected to at the time the Master receives them, the Master's report cannot be afterwards objected to on that ground, or that the witness should have been examined upon interrogatories.(*a*) But the new order [*post* § 46. and vol. 1.] authorises the Master to examine *viva voce* also. When interrogatories are resorted to for the examination of a creditor, and to investigate his debt, it is either by a general set of interrogatories for the examination of all creditors as they bring in their respective claims, or by a separate set of interrogatories prepared and framed to meet the case of some particular creditors. Which of these modes you resort to, will be governed by circumstances. It appears to be generally received, that a creditor coming in under a decree is considered a *party* to the cause, so far, that interrogatories for his examination in that capacity are to be settled by the Master, as in case of a party regularly; and that, therefore, in case of a separate set of interrogatories for the examination of one creditor, the Master (and not counsel, as in case of a *witness* to be examined before an *examiner*) settles such interrogatories. In such case, therefore, the credi-

Small claims. Contested claims. Interogatories or *viva voce* examination of creditors or witnesses.

(*a*) 1 Grant 400-1, c. New. 333.

tor's Solicitor will be entitled to a copy of the interrogatories, and to attend the Master to settle them, and to prepare and put in the examination(*a*) If *witnesses* for or against a creditor's claim are to be examined, the mode is pointed out [*post* § 46-7.] The Master's report may be excepted to by a creditor in relation to his claim. But after a decree, a creditor may be restrained by injunction from suing executors at law without leave of the court. [see further as to creditor's claims *post* § 50.] with respect to *legatees and next of kin*, who choose to come in under the decree, their claims are preferred in a similar way to those of creditors, with the necessary variations, and the precedents of *charges and claims* for those purposes will be found [*post* § 50.] In taking executorial accounts, *legatees*, when numerous, are required to *embody* their claims in one charge, or at least in as few as may be, and not multiply expense by carrying in *separate* claims, where they constitute one class of persons claiming under the same security or title.(*b*)

Legatees and next of kin.

In case of a *mortgagee* defendant, his claim for principal and interest, or his security, must be carried in before the Master, and prosecuted by summonses on leaving, and to proceed in the usual manner, supposing he has not been advised to decline coming in under the decree, and to stand upon his security. [See form of such claim § 50.] For supporting such claim before the Master, the mortgage deeds, and evidence taken in the cause, will be sufficient. Being a defendant, he will be entitled to all his costs, as in the cause. Should any dispute occur, or objection be taken, it must most probably be brought to the Master's notice regularly, by a *state of facts* on either side, to be prepared and carried in, and proceeded upon. This may be entitled (after the usual style of the cause) thus : 'State of Facts, and objection on the behalf of the complainants to the claim of ——, (*describing the creditor*) as a creditor upon the estate and effects of A. B., the intestate, in the decree in this cause named, for and in respect of, (*a bond debt, or otherwise, as the case may be, and naming the amount,*) and interest under the said decree.' Such a state of

Mortgage creditor.

Creditor's claims if disputed, how objected to or supported. State of facts, and proof in opposition or support.

(*a*) 1 Grant 401 2. c. Sec 1 Newl. (*b*) 1 Grant 265. 402. 333. 16 Ves. 239.

CHAP. II.

facts must obviously be grounded upon the objectors' apprehension of the validity of the objection to the debt. It will, therefore, set forth the security, together with whatever allegations can be made, as to want of proper considerations, or any improper conduct in any of the parties, or the illegality of their proceedings. After stating which, it will conclude by submitting, 'that the said claim of the said —— for ——, and in respect of such bond, (or mortgage, &c.) and interest, as aforesaid, ought not to be proved and allowed in this cause.' In support of his claim the mortgagee may also carry in a state of facts in opposition to the other, and examine witnesses, as in any other case, [*post* §47.50.] and by commission or otherwise; and the objecting party may *cross-examine* his witnesses, but not examine in *chief*, to disprove his state of facts. It is most probable that matters of this description, if of magnitude especially, will require the advice of counsel(*a*)

State of facts and proof.

Whatever inquiries are directed by the decree, the mode of meeting them is, as heretofore observed, generally speaking, by a *state of facts* so constructed, and comprising all necessary facts and circumstances, as to inform the Master of the points inquired after, and which must always be *proved*; but such proof is more or less rigid in proportion to the nature of the matter and the character of the cause; for much trouble may sometimes be given by hostile parties and clashing interests, which otherwise would not be requisite for the Master's satisfaction; as in requiring interrogatories, instead of being content with affidavits, [*ante* p. 101.] and the like, which, nevertheless, is not to be indiscriminately condemned.(*b*)

Evidence. Examination of witnesses before Master or on commission, or before an Examiner.

But it is now left to the Master to point out preliminarily, whether the matters requiring evidence shall be proved by affidavit or by examination of witnesses. [vol I. p. 42. § 42.] And the Master may examine any witness either upon written interrogatories, or *viva voce*, or in both modes, as the nature of the case may require. [ib. p. 43. § 46.] It is possible, that in the proceedings before the Master after a decree, as well as in bringing the cause to a hearing, it may be necessary to examine witnesses, and obtain *evidence*, for the purpose of

(*a*) 1 Grant 427-8. (*b*) 1 Grant 403.

satisfying some of the inquiries directed by the decree to be made, and which cannot be obtained from any of the parties to the suit, or evidence taken in the cause; the course is then as hereafter adverted to. [*post* § 46-8.] When the evidence has been thus obtained, it may be read before the Master in support of any charge or state of facts to which it may be applicable, besides that for which it was immediately obtained.(*c*)

Costs on separate report as for maintenance, or costs of parties up to the hearing. Division of costs into those up to the hearing and subsequent costs. Summonses for all parties to bring in their bills, &c.

On the propriety of applying for costs on the occasion of a separate report [§ 51.] as for maintenance, [p. 114.] or waiting until the end, or some other period of the suit, various circumstantial considerations are to be attended to. Yet it may be useful to observe, that it often occurs in a suit, especially if an amicable one, that there are funds in court (viz. monies paid into court in the cause as part of the testatorial assets,) which are very properly available for the payment of the costs of any intermediate or interlocutory proceeding in the suit previous to the decree or the Master's general report, either of which may sometimes be much and unavoidably protracted. For it is to be observed, that the regular division of the *costs in the cause* is, into costs *up to the hearing*, and *subsequent* costs, viz. those which occur *after* the decree, after the Master's general report, and after the hearing upon the *further directions*, consequential upon such general report; in which further directions the taxation and payment of the subsequent costs (and indeed *all* the costs, if those to the hearing have not been before paid for want of funds in the court) are provided for. If, therefore, the application for maintenance be either *before* the decree, (which it may be, if requisite, under a special application,) or *after* that, and of course before further directions; and the regular taxation of the costs in the cause is still likely to be long delayed, and there are funds in court properly available; you may add to the prayer of the petition for confirming the separate report [§ 51.] of maintenance, a further prayer to this effect, 'that it may be referred to the V. Ch. or the taxing Master of the — circuit; [§ 82. v. I, p. 81.] to tax all parties their costs of, and occasioned by, this application, and (supposing a sum has been stated in the petition to be

(*c*) 1 Grant 393.

CHAP. II.

now standing in the name of the Register, &c., see vol. 1. p. 286., and if so, you obtain his *certificate* of funds and cash,) 'that the said Register, &c. may be ordered by and out of the said —— cash standing in his name in the books of the President, Directors & Co. of the bank of ——, to the credit of the said cause, to pay such costs, when so taxed, in manner following, that is to say, the costs of the complainants, to Mr. ——, their Solicitor; and the costs of the defendants to Mr. ——, their Solicitor.' [Should you be concerned for all sides, in all cases you must name some friend, a Solicitor, for receiving the costs of one of the parties; and if, instead of cash standing in the Register's name, the property consist of money in the funds, then, instead of what is applicable to cash as above, say] 'and that the said Register, &c. may be ordered to sell so much of the said ——, —— per cent —— standing in his name, &c. (as above) as will be sufficient to raise and pay such costs, when so taxed, and that when so raised, he pay the same in manner following: so much thereof as shall be sufficient to pay the complainants their costs unto Mr. ——, their Solicitor; and so much thereof as shall be sufficient to pay the defendants their costs unto Mr. ——, their Solicitor.(*a*) As to the mode of obtaining the money out of court, see *post* ch. 8. § 48. and vol. 1. p. 286.

After the evidence has been taken as before spoken of, it may now be seasonable to remark, that when, as is generally the case, the decree directs the taxation and payment of the costs of all parties up to the hearing, (or at least the taxation, for the payment does not always then follow, unless there is a fund in court out of which they may be paid,) a proper time should be selected for the purpose. Whenever, therefore, you conceive a fit period to be arrived, (viz. as much of the business of the suit completed as may be, and the proceedings in a convenient state,) and having of course previously attended to the preparation of your own costs, you will, in the first place, take out a summons, to be underwritten 'at which time all parties are to bring in and leave their bills of costs to the hearing of the cause.' This may be before or after your having left your own costs.

(*a*) 1 Grant 399.

But when you have done so, you will then take out a summons, and underwrite it. 'The complainants have left their bill of costs to the hearing,' your next summons will be, 'to tax (p. 123.) the complainant's costs, and so underwritten. In case of dilatoriness, even in this part of the suit, you will have, as in other cases, to *repeat* your summons on the defendants, 'to bring in and leave their costs' unless under the new order the first summons be *peremptorily* proceeded upon, and in case of default the Master will *certify* the default, and make his report of it, excluding the defaulters of their costs. [But see *post* as to costs § 80-2.] But if costs are brought in, and not attended to afterwards, you may take out summons, and proceed *ex parte* to tax them, if still neglected. The costs must be disposed of in *some* way before the Master can make his general report.(*a*) As to the process of taxation see *post* [§ 80-3.] As the costs in the cause though during the proceedings in the Master's office *taxed* up to the hearing, are yet (unless there be an applicable fund in court) not often *paid* until after the cause has been heard on *further directions and costs*; the mode of *receiving* them is noticed hereafter at that stage of the suit.

Sales before the Master: particular of the estates to be sold, title, settling particulars. Conditions of sale annexed.

We proceed therefore, to another stage or probable proceeding in the cause, namely, the *sale* before the Master, of the *real estate*, as directed by the decree. In case of real estates, the account of rents and profits must be prepared and proceeded in, in the same way, so far as applicable, as in the case of personal estates. In both, care must be taken to be furnished with the necessary vouchers for every payment for taxes, repairs, and outgoings, above (£20 see *ante*.) Sums less than that amount are usually allowed under the general oath, taken by the defendant on putting in the examination, as to the truth thereof.(*b*) Where the whole or some part of the property comprised in a suit consists of *real estate*, [by which is presumed to be meant leasehold, as well as freehold lands, &c. especially where intermixed,] it is seldom perhaps that a sale of a larger or smaller portion, if not of the whole of it, is not wanted, for the payment of debts, or legacies, or costs, in which cases such sale

(*a*) 1 Grant 403. (*b*) 1 Grant 428.

CHAP. II.

forms part of the directions of the decree. The Master is the acknowledged officer of the court for this purpose, and his judgment will be required to concur, at least, with the Solicitor's, as to the exact *time* when this proceeding should be resorted to, and also as to other considerations connected with it: but (under his superintendence and authority) the requisite measures for effecting it are necessarily conducted by the Solicitor in the cause, as being, from his conversancy with the local and other descriptions of the property, as well as with the testator's title to it, best capable of taking every necessary step.(*a*) A particular of the estate(*b*) is not often necessary here, as our sales are usually of a distinct parcel pledged for a particular debt, but cases may arise where it might become advisable for the Solicitor to prepare such particular, and have it settled by the Master, as is done in England in the following manner. From the title deeds in the Master's office, or elsewhere; from maps, surveys, and all other documents to which the Solicitor has access; he will, therefore, *first*, prepare a '*particular*' of the estates to be sold. In doing which, if the property be of a nature to require it, or be very considerable, it might be prudent, both for the Solicitor's justification, and the client's interests, to resort to the assistance of a respectable surveyor, who must be supposed, especially if resident in or acquainted with the country and neighbourhood of the property, capable of advising as to the best *mode* of selling, whether altogether or in a few or many lots; and if the latter, in dividing and allotting the premises with that view. The principles and habits of the court on these occasions require an entire abstinence, in the '*particular*,' from any description enhancing, unduly, the value, or to mislead a purchaser; both which must, by the possibility of litigation, tend to create expense to the estate; and especially an excessive statement of its annual or other *value* must be avoided. Accuracy, therefore, and no more than such statements of the qualities or incidents of the property, as are adapted to give a *just* idea of it, are sanc-

(*a*) 1 Grant. 280 See Hoff. Mast. as to sales by Master ch. xi. p. 212. &c. and *ante* vol. 1. p. 211. &c.

(*b*) See Hoff. Mast. 215.

tioned in the Master's Office; where, after having prepared and fairly transcribed the particular, you *leave* it for the Master's approbation; and he sometimes requires its verification by affidavit. It much behoves the solicitor to be extremely cautious and correct, and even scrupulous, in the description he gives of the premises, that it may be fully borne out by the facts. A contrary course would expose to great inconveniences. Timely attention also would very allowably and ought to be paid to the *title*, which should undergo at least sufficient examination (and that by counsel if deemed necessary) to satisfy the solicitor that it will afford no opportunity to a purchaser to object to it *successfully*. Having 'left' the particular of sale in the Master's Office, the '*settling*' it must be proceeded in by warrants, (summonses) like other matters. The first warrant you take out and serve on the Solicitors of all interested parties, will be underwritten, "On *leaving* the particulars of sale of the estates directed by the decree to be sold." Those parties will take copies from the Master's Office. The subsequent warrants will be, "To *settle* the particulars of sale." The same mode of proceeding *exparte* will be pursued in this, as in other cases, if the other parties, or any of them, do not attend the warrants. The *conditions* annexed to the particulars require also some attention: they will be framed with an eye to the circumstances, and will besides have the Master's sanction, especially in case of doubt. In case of the estate *being in hand*, and not occupied by a tenant, as well as where it *is so* occupied, it may possibly save dispute, if not litigation, if you even request the Master, if necessary, (though he should think it uncalled for, under the supposed practice of the Court in such cases,) to allow the insertion of a condition, that notwithstanding the estate being in hand, all usual payments and allowances should be made by and between the vendors and purchaser, as in cases of incoming and outgoing tenants, and according to the custom of the country, in private sales, under similar circumstances. This, however, is rather meant as a hint for consideration, than a matter of positive adoption. The usual condition, that error or misrepresentation shall not vitiate the sale, but that in such cases proper abatement, allowance, or compensation

CHAP. II.

should be made on either side, has been construed to mean only moderate, and certainly unintentional, and sometimes *unavoidable*, instances of that nature.(*a*) Inconsiderable variations, therefore, either in quantity or description, small incumbrances, quit rents, outgoings, &c. either not known before or overlooked, are subjects of such compensation.(*b*) The subject of the production of a lessor's title, in case of selling a leasehold property, having been lately much discussed, and the necessity of that production established; it may be very proper to guard against it by an express condition.(*c*) And as the Master's authority in settling the conditions is conclusive, it might be useful to obtain from his office some instances of conditions, which have passed his hand, to assist in preparing *yours*. It may sometimes be even requisite to have *counsel's* sanction to the conditions, especially if matters of title are to be guarded against, or other peculiarities in the circumstances of the property.(*d*)

Notice or advertisement and proceedings on sale.

When the particulars are settled and *allowed* by the Master's mark or initials, you may then proceed with the advertisement, which, generally speaking, is the same as, or very similar to, and subject to the same cautionary rules, as the particulars. You may prepare the advertisement; or obtain it at the Master's Office, and procure the Master's signature, authorizing its insertion. The places, duration, and fees for advertising and mode of sales of real estate by the Master are regulated by rule and statute [see ch. 7. § 17. and vol. 1. same ch. and § p. 211-14.] The decree directs the sale to be in the county where the lands lie unless by consent or for special reasons it be ordered to be sold elsewhere. The papers in which the notice is inserted, in this instance as in an advertisement for creditors [*ante* 103-4.] may be secured and kept as vouchers, but the affidavit of the printer is sufficient [vol. 1. p. 213. n.] If from the magnitude of the proposed sale it be desirable to awaken public attention at an early period, a *first* advertisement similar to that on sales in England, general

(*a*) 1 Grant 280-1. c. 1 Meriv. 26. (*c*) 3 Meri. 53.
(*b*) 1 Ves. 212, 221. 5 Ves. 818. (*d*) 1 Grant 184.
1 Sim. and Stu. 142.

in point of time as well as description, and only informing the public that such estate is to be sold by the Master, may be obtained and published, or distributed, or both. This may be had and inserted *earlier* than waiting for the particulars being settled, in cases where it may be desirable, and where, from your acquaintance with the property, and there being no difficulties as to the particular estates to be sold, such early preparatory notice may appear advisable. As to the number of papers, and the expenses consequently incurred in advertisements, there is room for discretion. It is conceived that, generally speaking, the benefits of ample notification are more than commensurate with the expense; a few pounds are the extent of the latter, while the attraction of a single bidder, who may see or be struck with one advertisement and not another, may, beyond calculation, well justify the former. It is presumed, that solicitors differ on this point; but if an estate, and the property in the cause will *well bear* a *comparatively trifling* expense, it is conceived to be for the interest of the parties concerned to incur it on such an occasion; nor, perhaps, would much difficulty be found on the taxation of the costs, especially in amicable, and perhaps not even in hostile instances, if due care had been used. With respect to the *printing* of the particulars, that is a matter also which the Master generally leaves pretty much to the Solicitor's similar discretion. *Enough* should certainly be struck off (and the more or less is not very material in expense) for sufficient distribution, some for the Master's Office, some for the different solicitors in the cause, some for different places in the country and elsewhere, and other persons, as circumstances may direct.(*a*) In a decretal order for sale, at least of mortgaged premises here (for in England a sale on foreclosure is not decreed, though it is in Ireland; sales in England, being usually in cases like the one under consideration, viz. for administration of a testator's assets upon a deficiency of the personal property) a clause is inserted allowing the complainant or any other party to become the purchaser. But a mortgagee has been permitted to bid at the sale, even without such

Parties allowed to bid. Reserved biddings in England, and sale how conducted.

(*a*) 1 Grant 282 3.

CHAP. II.

prior clause. In England, the Master will not, without the authority of an order, adopt a *reserved bidding* on behalf of the parties interested in the estate; but which, if deemed desirable, may be made the subject of a motion or petition, and which will direct the Master to fix *one reserved bidding for the estate, if sold entire; or if in lots, one bidding for each lot*; and then the reserved bidding must be made one of the conditions, viz. *that the vendors reserve one bidding for each lot, or for the estate, if offered in one lot*, to be fixed by the Master.(*b*) The order is there served on all proper adverse parties; a survey and valuation of the entirety, and of each lot, made; a state of facts embracing the order, survey and affidavit of surveyor, carried in, warrants taken out, and the sum for the reserved bidding fixed by the Master. The affidavit on this and similar occasions is not *filed*, but *left* in the Master's office originally, nor does the Master make any report or certificate of his proceeding. Should not a higher price than the reserved bidding be offered, the estate is declared not sold, but bought in for the parties interested. But the more common course even there, it seems, is to procure some friend to attend the sale, to protect the estate from going under its estimated value.(*c*) The mode of conducting the sale here [see ch. 7. § 17.] is, at public auction. If no adjournment take place(*d*) the Master, or the auctioneer in his presence, if any employed, announces the terms or conditions, or in special cases reads the particulars and conditions as settled, then takes the bids in succession without delaying to put down the name of each bidder, until the highest bid is offered and the lot struck off, when the auctioneer enters on a memorandum the sum and name of the purchaser; and in so doing, acts as his agent, and the purchaser may be called upon at once to sign an article of purchase containing the conditions, and to pay the deposit to the Master; who upon refusal to do so may, if it was a part of the terms as announced that the biddings should

(*b*) 1 Grant 284.
(*c*) 1 Grant 284-5.
(*d*) As to adjournment prior to or pending the sale, see Hoff. Mast. 217-220.

be kept open till deposit made, instantly set up the lot again, or compel the purchaser to complete his purchase, as hereafter mentioned. If the Master have entire confidence in the intention and ability of the purchaser he is usually allowed to call afterwards at the Master's office, and sign the articles there, and to pay to him the deposit. But instances might occur where such indulgence and confidence would be misplaced, and the consequence be, after the bidders had dispersed, the property must be re-advertised, an order being *previously* obtained for that purpose on the ground of the inability or refusal of the purchaser. In this case, however, the order may be so adapted as not to discharge the purchaser, but to hold him to make up the deficit, if on a second sale, the property should bring less than his bid.(*a*) In England, the sale if in town is at the public sale room of the court, in the buildings where the Master has his chambers. The mode of conducting the sale there, by the Master's clerk, is, that when the business has commenced, by his reading the particulars and conditions, he then, on a sheet of paper, puts down the biddings for the estate, or for the different lots, as the case may be, with the name of each bidder, which he collects from the bidder himself, or some other quarter: some person, or in default of any other, the Solicitor having previously named a sum at which the estate or lot is put up: if that be done by a stranger, he is *regularly* required to sign his name to it; every other bidder, *regularly*, may also be required to sign his name to each bidding; but that is not always observed; the name, however, of every person with his bidding is put down by the Master's clerk upon his bidding-paper. This is done, until no one advances on the last bidder, who is then declared the purchaser. Thus all the lots, if more than one, are gone through, but should any remain unsold, they must (in Eng.) be again advertised for sale, subject to consideration as to time, and other circumstances.(*b*) It is not generally necessary for the defendants to attend the sale of the estates, unless, under particular circumstances, they hold themselves interested in not suffering it to be un-

(*a*) See Hoff. Mr. 220. 233. 238-7.
(*b*) 1 Grant 285 but see as to adjourning sale, Hoff. Mast. 217-220.

CHAP. II.

der-sold. Neither are they concerned in attending the Master on disputes with the purchaser respecting the conveyances, unless they themselves are parties; in such case they should attend, and take copies; and attend the warrants to settle the draft, and for the other purposes, on their own account, as may appear necessary.(a)

Report of purchase filed and confirmed by rule nisi, or by consent rule absolute.

In case of sale on foreclosure before a deed can be given, the mortgage must be filed, the decree enrolled, costs taxed and filed, the bill of costs now, forming part of the enrolment, and before the purchaser be let into possession, the *report* of sale confirmed. [See ch. 7. § 18-25. vol. 1. p. 214. &c.] If on inspection of the title deeds voluntarily submitted, the purchaser be satisfied, he pays the money to the Master and takes the deed, which in case of mortgage sales here is executed by the Master, and not as in the suit now under consideration, by the parties joining in a conveyance. In England after the biddings are over, the Master's *report* of the purchase is the next step, and is to be obtained by and at the expense of each purchaser, as the preparatory step to his completion of the purchase. And if the purchaser be either an *unwilling* purchaser, or, from whatever cause, unreasonably dilatory, you may urge him forward, by yourself obtaining from the Master such report of his being the purchaser, and then proceeding as after-mentioned. But otherwise, the purchaser himself having obtained the report, and filed it and taken an office copy, will then confirm it by motion or petition *of course*, 'to move that the Master's report dated —— of Mr. —— being the best purchaser of the estate in the decree, in this cause mentioned,' (or of *lot* 3, &c. as the case may be, and describing it,) 'may be confirmed.' This will be an order *nisi*,(b) which here becomes absolute of course without further order in eight days, unless exceptions be filed and served [§ 53. and vol. 1. p. 46.] All orders, in their nature *conditional*, and this amongst others, *may* be made *absolute* in the *first instance* by *consent*, which is sometimes very convenient: but it precludes the opportunity given by the eight days,

(a) 1 Grant 428. (b) 1 Grant 285-6.

Paying in purchase money, and obtaining possession, rents and profits; exceptions as to quarter day; fire; interest, deposit, laying out in funds; purchaser owner; appearing on motion, opposing motion; laying out; paying out and using the purchase money.

in the order *nisi*, to open the biddings, and may therefore be deemed irregular.(*a*)

The biddings may be opened, of which more hereafter; or the purchaser may be dissatisfied with the title, of which, also, more hereafter. But if neither of those circumstances occur, and the purchaser is desirous of paying his purchase money into court, that he may be thereupon let into possession,(*b*) and which (if neither of the above-mentioned interruptions prevent) is the next thing to be done, the purchaser is to apply to the Court upon motion, with notice to all necessary parties, that he may be at liberty to pay in his purchase money, and be let into possession of the premises, and into the receipt of the rents and profits, which will be ordered as from the quarter-day *next preceding the day of payment of the purchase-money:* and under whatever circumstances the money has been delayed to be so paid into Court, the purchaser will not be entitled to an *earlier* perception of the rents, though some intermediate days of payment of rent have occurred, which, therefore, will belong to the vendor; at least, this practice obtains whenever the delay arises from the purchaser himself, and from no default on the part of the vendor: for the purchaser might always have entitled himself to possession of the rents, by applying to pay in, and accordingly paying in his purchase-money: and a special application for that purpose might be guarded against its operating as an acceptance of the title.(*c*) Exceptions, however, to the rule of giving possession from the quarter-day, may occur in cases of estates, *not fee simple*, and where the property is of a peculiar nature, such as collieries, &c. the profits of which may be weekly; or manors, comprising casual fines on deaths, and other incidental profits. Such instances will require particular attention in settling the rights of the parties, and drawing up the order for being let into possession in consequence.(*d*) Also, as

(*a*) ib.

(*b*) 1 Grant 286. Possession may be demanded in case of mortgage sale, upon production of Master's deed and certified copy of the order after it is absolute, confirming the sale [see ch. 7. § 24. vol. 1. same ch. and § and p. 212. 218.] If the purchaser be denied possession, the compulsory process of writ of assistance, &c. may issue. See ch. 2. § 84. and vol. 1. p. 87.

(*c*) 1 Grant 286-7. 1 Coop. 95. Hoff. Mast. 237-241. But a final decree must be enrolled before conveyance to purchaser, vol. 1 83-4.
1 Turn. Rep. 70.

(*d*) See 8 Ves. 502. 2 Cox, 231.

CHAP. II.

to estates held on lives.(b) In case of loss by fire before the confirmation of the purchase, the loss will fall upon the seller.(c) And when the report has been absolutely confirmed, it has relation back to the time the bidding was entered in the Master's book, which constitutes the purchase.(d) As to the payment of *interest* on the purchase-money, that is payable from the confirmation of the report, or from the time when it *might* have been confirmed; in which case the seller becomes a trustee for the purchaser as to all advantages or disadvantages after that period.(e) In the case of the biddings being opened, as adverted to, and which will be fully considered presently, the *deposit* paid upon that occasion is considered part of the purchase-money. If the purchase-money be *laid out* in the public funds (which either party may apply to the court to have done, or may concur in doing; but it is quite a matter for consideration and discretion); the estate, not the purchaser, will have the benefit of a rise; but in a case where the deposit was laid out, and the accumulation considerable during objections to the title, interest at 4 per cent. on the original deposit was allowed to the purchaser, and held to be all he was entitled to.(f) The purchaser is not considered as owner of the estate from the confirmation of the report, and while objections to the title are in agitation; but only from the time he pays in his purchase-money (the order for which always declares him to be *satisfied* with the title) and takes possession, or rather, perhaps, when he *might have* taken possession, if he pleased.(g)

It may, in some cases, be proper to oppose this application made by purchasers of *lots* to pay in, and for possession. In such cases, you will prepare a brief for your counsel to appear on the motion, and furnish him with such instructions for opposing it as may be called for by the circumstances. The probable grounds of opposition to this application are various; it may be, that the purchaser is only entitled to the rents from the quarter-day preceding the notice, or some other time;

(b) 3 Atk. 638.
(c) 11 Ves. 559.
(d) 1 Ja. & Wa. 639.
(e) 13 Ves. 517. 2. P. W. 410.
(f) 1 Cox, 206.
(g) 2 Madd. Rep. 34.

or, for the purpose of enabling you to settle some terms with the purchaser upon the subject. But even, if no objection be made to the application, it may be useful to appear, though not absolutely required, as well to *consent* to it, which in some cases may be desirable, as to pray, at the same time, (thereby, perhaps, saving your own application afterwards separately,) that the purchase-money, when paid in, may be laid out in stock. It may be also advisable to appear, even for the purpose of giving explanations which the court may possibly want. And as the directions to lay out the purchase-money will thus form part of the order for paying the money into Court, you will only have afterwards to obtain from the Register, &c. and sign, the usual *request* for laying out the money.(*a*)

It is very usual for the order now under consideration, to direct that the purchase-money, when so paid in, be not *paid out* without notice to the purchaser. When the course of the suit requires the use of the purchase-money, the application is by special motion, on notice to the purchaser, to be served on him personally, with an affidavit of such service. But the court will not listen to any objection on the part of the purchaser after his acceptance of the title, payment of the money, and execution of the conveyances in the regular way; but will leave him to the covenants in his deed.(*b*)

Question of title disposed of before purchase money paid in: Abstract, reference, copy abstract, summonses, counsel, examining abstract, Master's proceeding, conveyancer, objections to title, report, objec-

Previously, however, to these proceedings, of paying in the purchase-money, you may have been conflicting upon the title: if so, and where the parties cannot satisfactorily settle matters of title between themselves, the purchaser, in proceeding to complete his purchase, will have applied to the court, by special motion on notice, that the vendor's Solicitor may deliver an abstract of the title: or, if an abstract(*c*) has been delivered, for the usual order of reference to the Master on the title. The purchaser will proceed with this, as on other orders, and leave a copy of it in the Master's office. He will then take out a summons for the vendor to carry in an abstract, of which, in such case, he must take a

(*a*) 1 Grant 295.
(*b*) 2 Cox, 394. cited 1 Grant 288.
(*c*) 1 Grant 283. Sed. Quere. Hoff. Mast. 230-2. *See* form of abstract in Preston's Ab. of Title.

CHAP. II.

tions, exceptions, report, in favor or against title; draft of conveyance, settled and allowed by Master, and deeds executed by the parties.

copy; but if, as is most probable, an abstract has already been delivered to him, then he, the purchaser, must, with the order, leave such abstract; on this occasion, as on others, the usual summonses must be taken out and served on all necessary parties; the purchaser, of course, is the *proper* person to do it; but in case of his inattention or delay, the *vendor* may enforce the prosecution of the title by the same process, of taking out successive summonses, serving and swearing to the service, and ultimately proceeding *ex parte*, if necessary, before the Master, as in other cases before explained. The first summons will be underwritten, 'the purchaser has *left*,' &c.; the others, 'to *proceed* on the abstract of title to,' &c. Frequently the parties, if not the Master, require the attendance of counsel upon these occasions. Previously to this, the purchaser's Solicitor will most probably have compared the abstract with the title-deeds, either in the complainant's Solicitor's office, or elsewhere, wherever they may be; or in the Master's office, carried in thither under the decree. See *production of deeds*, &c. [p. 110. and *post* § 44.] In cases of difficulty in matters of title, the Master, (in Eng.) instead of hearing the Solicitors or Counsel, in support of and against the title, and then determining upon his own opinion, may, if he please, at once direct the abstract to be laid before a conveyancer of his own naming, for his opinion in aid of his own judgment; in such case, the Master prepares instructions, in writing, for such conveyancer to advise on the title, accompanied by the abstract left in the office, with a copy of the order, and the *objections* taken by the purchaser; [which *objections*, in *writing*, the purchaser will have *previously left* in the office, and the vendor's answers thereto.] All these are then, by the Solicitor for the purchaser, taken and laid before the conveyancer named; and on receiving his opinion, they are again left by the same party in the Master's office with such opinion: after all which, the matter may still be thought of sufficient difficulty or moment to require the attendance of counsel before the Master. If so, the necessary papers are to be delivered to a counsellor; and a time being settled with the Master, the necessary warrants ar

to be taken out and served, 'to proceed on the abstract of title;' and adding, 'Mr. —— will attend.' These and similar matters may often be dispensed with or modified and facilitated by arrangements between parties, which cannot possibly be anticipated here or described A general mode of practice can only be given, to be adopted or applied, or varied, as *special* occasions may require. The Master's *report* on the title (to be obtained by the *purchaser regularly;* but if *necessary*, from his default, by any other party anxious to *expedite* the business,) will succeed this hearing of counsel or solicitors, as the case may be. The report will be proceeded with in the usual manner; and in the interval of *signing*, any party *dissatisfied*, (having first taken a copy and perused and considered it,) is in the usual way, to carry in *objections;* which, as explained under *Master's report* and *objections* [*post* § 52.] are, if not removed on the hearing and discussion of them before the Master, to be followed up by *exceptions;* which are to be filed and set down for argument before the court, as in other cases of *excepting to the Master's report*, which see. [ch. 8. § 68.] If the Master's report so excepted to was in favour of the title, and the exceptions taken to that report are overruled, *other* objections to the title cannot be made; but if the exceptions to the report are allowed, and a new abstract of title is delivered, then farther objections may be brought in.(*a*) Should the Master's report be *against* the title, that report may be dealt with in the same way as in the former case; and if on hearing the exceptions, they should be allowed, or if the title be reported good, and no objection taken, the purchaser, as a matter of course, will be held to his purchase, and should proceed to complete it; otherwise, on a motion with notice, if such be rendered necessary by his delay, he will be ordered to pay in his purchase money, and complete his purchase; but if such report against the title be submitted to, the purchaser will then be discharged from his bidding.

When the state of the title, or the purchaser's acceptance of it, will admit, his Solicitor will have prepared, and will tender to the vendor's Solicitor, a *draft of the conveyance*, which the order or decree usually directs to

(*a*) 4 Madd. 212. cited 1 Grant 239.

CHAP. II.

be settled by the Master, in case the parties differ about the same. Should that direction have been omitted, (and parties disagree,) a *special* application must be made for such an order, viz. that it may be referred to the Master to settle the draft, with the usual directions for delivery of the title deeds, and attested copies, and covenants for production. This application may be by motion or petition. The order must be served upon the several Solicitors; and the ordering part, with the draft of the conveyance, left by the Solicitor in the Master's office; and then, as in other cases, take out and serve the necessary warrants, on leaving, and to proceed in the same way as on the abstract of title: and should the Master choose to have the assistance of a conveyancer, in settling the draft, similar measures must be pursued on that occasion as on the abstract, as before described, with the necessary variations. The draft being at length settled, an engrossment will be made and the Master's *allowance* of it written in the margin of the deeds. His *certificate* of having settled the conveyance is then to be obtained, and filed, and an office copy of it taken; the respective Solicitors will of course attend to the due examination of the engrossments. Should any disputes arise upon the deeds to be delivered out, or attested copies, or covenants for production, warrants must be taken out and attended thereon. The execution of the deeds finally is, of course, matter of arrangement between the Solicitors, and follows the general routine of *conveyancing* practice.(*a*)

Setting up the estate again, or enforcing the purchase. Precept in nature of peremptory attachment, abstract; purchasers application for possession with a saving clause.

It has been observed [*ante* 131.] that if any lots remain unsold, [and no adjournment(*b*)] they must be again advertised for sale. So also, in any case of an unfair or litigious purchaser afterwards requiring unreasonable deduction or abatement from his purchase, or other compensation, on account of a real or pretended (but immediate) defect or error; the court will, it is conceived, not permit an inquiry into it by the Master, but make the purchaser elect to take the estate at the price bid, or abandon the pur-

(*a*) 1 Grant 270.

(*b*) As to adjourning sales see reference, *ante* p. 130-1. note (d)

chase, and the estate to be put up again. In such case it *may* happen that *such* purchaser would gladly embrace the *former* alternative.(*a*) We proceed now to the *enforcement* of the completion of the purchase upon an *unwilling* purchaser. The first step, as has been mentioned, is to confirm the Master's report of the purchaser being the best bidder. You will, therefore, first obtain from the Master's office the *report of purchase*, which you will file, and then pursue the usual course for *confirming it absolute*. [*post* § 53.] In this state of proceeding it is considered unnecessary, when the purchaser thus suffers the vendor's Solicitor to confirm the report, for the latter to deliver the purchaser an abstract of the title previously to the former's *application to compel payment* of the purchase money into court, though, perhaps, it will have been better done, as a matter of course, before that moment. Such application is the next step, and is on special motion with notice, grounded upon the Master's report, and the order confirming it when *absolute*. The *notice* requires *personal* sevice upon the purchaser; but it is apprehended that, in extreme cases of impracticability of service, a substitution of service may be obtained upon application supported by affidavit, [see § 35. *ante*.] The order on this application (see *the order*, *post*) will direct the purchaser to pay into court, within a limited time, perhaps fourteen days or more, the sum at which he is reported purchaser. It requires *personal* service on the purchaser,—a writ of *execution of the order* being irregular, in case of a purchaser who is not a *party in the suit*,(*b*) After service of this order, therefore, (but *qu.* as to substitution of service in the case of the impracticability of personal service,) should the purchaser not pay in the purchase money, an affidavit should be made of the service, and of the non-payment, which you will ascertain by the (Assistant) Register, &c. and having filed the affidavit, and taken an office copy, you thereupon(*c*) may, perhaps, (instead of the English course of moving on *notice*, for an order that the purchaser do stand committed to the custody of the serjeant at arms,(*d*) and making the order ab-

(*a*) 1 Grant 285.
(*b*) 1 Ves. J. 94. *cited* Grant 291.
(*c*) 1 Grant 291.
(*d*) 14 Ves. 512. But see Hoff. Mast. 233-4.

CHAP. II.

solute as in other cases by obtaining the Accountant-General's, here Register's, &c. certificate, and a subsequent order) apply for an order for a *precipt* in nature of a peremptory attachment pursuant to the provisions of the revised statutes,(*d*) as hereinbefore pointed out in relation to interlocutory costs. [§ 21 p 60. see p. 67. n. (*a*)] Should the purchaser, in case of proceedings not amicably carried on, himself confirm the Master's report of purchase, and then protract the payment of his purchase-money, and so oblige you to make the application just spoken of.—you will remember to have first delivered the abstract of title. If at this period the title should not have been referred to the Master by the purchaser, it must be done previously to the proceedings just mentioned, on your application, by an order on motion with notice, and having obtained and served the order, it must be proceeded in as before described, as to the reference of the title.(*c*) You will then, doubtless, have also to procure the Master's report on the title; to which, if in your favour, the purchaser may object and except in the usual way; but if he do not object to it, or if his objections or exceptions should be overruled, you then give him the regular notice, to pay in his purchase-money, and to be let into posession, and upon his default proceed against him for the disobedience, in the manner already stated. It has before been explained, that the purchaser (being a *willing* purchaser) may, as soon as he pleases, whenever satisfied with the title, move to pay in his purchase-money, and do it, and be let into possession; and sometimes it may be very desirable to a purchaser, whose money is lying dead, so to do, *but without prejudice to any objection he may be advised to take to the title. Without* that saving clause, a purchaser is held to waive all objections to the title by taking possession generally, without qualification; and the order itself states him to have declared himself *satisfied* with the title.(*e*)

Discharging purchaser, in what cases.

The opportunity which a purchaser, even under a decree, has of vexing a vendor, is considerable, if he finds his own ends answered by *excessive delay*. In such case, however, the vendor is not without remedy, for, upon

(*d*) 2 R. S. 536. § 4. See Hoff. Mast. 233-6.

(*c*) Sed quere, Hoff. Mast. 236.

(*e*) 1 Grant 291-2.

the plaintiff's application, the purchaser may be *discharged* from the purchase, even after the order confirming the Master's report of purchase has been made absolute.(*f*) This perhaps, is a proceeding only, or at any rate most likely, to be resorted to where a purchaser is not of *ability* to complete his purchase; for if he is of sufficient responsibility, it has been seen that he may be made the subject of a compulsory process, that very few indeed can be supposed willing to undergo, who could avoid it. There is one case where a purchaser, having before the Master consented to *forfeit his deposit*, was held to be not bound to complete his purchase.(*g*) Various cases may occur to make it necessary that a purchaser should be *discharged* from his purchase, besides that of unreasonable delay. So, where the best bidder was discovered to have been *insane* at the bidding, there, upon the application of all parties for the next best bidder to be reported the purchaser, the court directed the estate to be *re-sold generally*, holding it irregular to permit the substitution of the next best bidder at the sum he bid.(*h*) A similar order has been made in case of the *imprisonment and insolvency* of a purchaser, upon affidavit of those facts.(*i*) And even where an estate was sold under an *erroneous decree*, the purchaser was discharged from his purchase.(*k*)

Substitution of purchaser.

The *substitution* of one purchaser for another, without a resale, is permitted by the court, on consent of all parties.(*a*) But consent is now perhaps not necessary; but the money must be paid into court, and an affidavit made that there is no under-bargain, as it might otherwise be an ingenious device to escape opening the biddings,(*b*) which, as will be presently seen, is considered to be for the benefit of the estate. All these applications are on motion with notice.

Question of conveyance.

It may be cursorily observed, in reference to so much of the foregoing as relates to the Master's *report on title*, that in taking exceptions thereto, a distinction is to be

(*f*) 14 Ves. 512.
(*g*) 1 P. Wms. 745. See vide Hoff. Mast. 234. See ib. 233. &c.
(*h*) 1 Cox, 205.
(*i*) 1 Ves. and Bea. 544.
(*k*) 2 Ja. & W. 287. 1 Grant 282.
(*a*) 2 Bro. C. C. 391.
(*b*) Note to 2 B. C. C. 391. Sugd. Vend. and Purch. 46. 6 Ves. 518. 1 Grant 282. See further Hoff. Mast. 229.

CHAP. II.

made as to what the court has separated into *questions of conveyance* and *matter* of title, the former of which the court will not entertain(*a*) It may also be noticed, that no evidence is to be received by the Master after he has settled his report.(*b*)

Opening biddings. Mode of proceeding; re-sale, purchasers' costs; deposits, Advance.

The *opening of the biddings*(*c*) is an important matter frequently in this part of the cause. It is peculiar to sales in the Court of Chancery, and is allowed, from the anxiety the court always entertains to consult to the utmost for the benefit of those who are the objects of its protection or care. This process is, in effect, the permitting a fresh sale, in cases where persons come forward and offer a higher price than was obtained on the first sale; but neither, on the other hand, and from the same cautionary superintendence of the interests of parties, will the court allow even of this beneficial proceeding, *ad libitum*, but only under certain rules. One rule is, that the application *to open the biddings* must, with few exceptions, be made *before confirmation* of the Master's report of the purchase. An advance of price alone, however considerable, will not of itself prevail to open biddings *after confirmation* of the purchaser's report.(*d*) The cases in which the biddings will be suffered to be opened, and the sale thus disturbed *after* confirmation of the report, and against a fair purchaser, seem very limited, and of the strongest features. The following may be stated as examples, viz. where the owner of the estate was in *prison* when the report was confirmed, and the advanced price offered being so large as one fourth of the original; but in that case the court required the deposit, in court, of the whole sum offered in advance.(*e*) Any circumstances, also, impeaching the conduct, either in point of fraud or neglect, of the purchaser or agent, or a case of mistake in the particulars, or otherwise,(*f*) or any legal objection to the *character* of a purchaser *as such*, whether as a trustee or otherwise: these appear to be instances in which the confirmation of the report would not be allowed to stand in the way of per-

(*a*) 5 Ves. 725. 16 Ves. 380. 1 Meriv 104. 1 Madd. Ch. 440. 1 Meriv. 179.
(*b*) 7 Ves. 587. But see *post* § 52.
(*c*) See also Hoff Mast. 223-6.
(*d* 2 Eden 348.
(*e*) 4 Bro. C. C. 177. 2 Ves. J. 51.
(*f*) 2 Eden, 348.

mitting the biddings to be opened after such confirmation.(*g*) Another rule is, that, in opening biddings, a *deposit* must, in *all* cases, be made.(*d*) The *amount* of such deposit will be considered presently. The person opening the biddings, as being desirous of advancing on the sum offered by the highest bidder, proceeds by application to the court, (on or before the day of moving to confirm the order *nisi*, by the first purchaser,) for leave to open the biddings, and stating the advance offered. This application is on motion with notice, to be served on the original purchaser and the parties in the cause: the service on the former must be *personal*. If, on the motion, the court approve of the sum offered, the order will be made accordingly, and it directs a re-sale before the Master. The service of this order, also, must be *personal* on the purchaser, he not being a party in the cause. Such application is considered in the light of *cause shown* against the application for confirming the first purchaser's report absolutely. Conformably to the terms of this order directing a re-sale, the party must pay the first purchaser his costs, and must also forthwith pay into court his *deposit*, sometimes of ten or twenty per cent, on the advanced bidding, sometimes of the whole advance itself, as the court, under the circumstances of the case, may direct, on the suggestion, perhaps, of the Solicitor for the vendors, who must be supposed to be best acquainted with those considerations. The Master will not proceed to a re-sale until satisfied of the payment of the deposit into court, and of the first purchaser's cost, charges, and expenses; to be taxed, if the parties differ.(*f*)

The principle, that 'biddings are opened for the benefit of suitors and of the estate, and not of the purchaser,'(*k*) appears to be influential on the court, with regard to the rules by which, in point of *amount of advance*, it will permit the biddings to be opened. For no fixed rule on that point is acknowledged; it depends on the circumstances of each case.(*l*) Biddings have been opened upon an advance of ten per cent. on *small sums*:

(*d*) 5 Ves. 86. 11 Ves. 57. 1 Bro. C. C. 287. 4 Bro. C. C. 177 2 Nor. by Eden, 348.
(*e*) 6 Ves. 513.
(*f*) 2 Ves. J. 283.
(*k*) 1 Ves J. 453.
(*l*) 1 Sim. and Stu. 21. 14 Ves. 151.

CHAP. II.

but it seems to be now understood that, in such instances, a smaller sum than 40*l.* will not be allowed as sufficient.(*c*) But where so large an advance as 500*l.* has been offered, the court will act upon it, though it be less than ten per cent. upon the original purchase money: but 350*l.* upon 3,500*l.* was refused.(*d*) In a creditor's suit, 500*l.* was admitted upon a bidding of 10,000*l.*, upon payment of the whole advance into court, and the purchaser's expenses.(*e*) An estate having been resold under the opening of the biddings, the person who opened them, but who was not present at the resale, again applied to open the biddings a second time. The application was allowed, on the ground of the purchaser having had notice, and not appearing to object, and on the terms of paying all the costs.(*f*) But a similar application was refused.(*g*) If a person opening biddings do not duly prosecute the order, and pay his deposit, the biddings may, on notice to him, be opened by any other person.(*h*) A person opening biddings, and being out-bid at the resale, is entitled to his deposit, but will not be allowed his costs on that ground; unless he can show that his *object* was the *benefit of the parties*, and that they were benefited.(*i*)

The case of collieries, mines, and property of that nature, is peculiarly regarded by the court, as well in respect of the rules for opening of biddings, (in which they seem to have a greater latitude,)(*j*) as in respect of the rule for possession of the rents and profits being generally taken from the quarter-day next before the payment of the purchase-money into court.(*k*)

Further account by way of discharge brought in by defendants, after the sale.

After the *sale of the estates*, (if such proceedings have taken place in the cause,) a similar account to that *ante* p. 111. &c. must be carried in of rents and profits, down to the time of the purchasers being let into possession and receipt of rents. This is to be pursued in the same mode, by leaving in the Master's office, mutually taking or serving copies on either side; taking out and serving warrants on all necessary and active parties

(*c*) 14 Ves. 151. 3 Madd. 494. 7 Ves. 420. 4 Madd. 460.
(*d*) 1 Sim and Stu. 21.
(*e*) 3 Ves. and Bea. 144.
(*f*) 16 Ves. 140.
(*g*) 3 Madd. 314.
(*h*) 4 Madd. 52.
(*i*) 1 Ves. and Bea. 361. 9 Ves. 348. 12 Ves. 6.
(*j*) 1 Turn Rep. 70.
(*k*) 8 Ves. 502. 4 Grant. 293-5.

in the suit; and attending the Master on each occasion, as with regard to the former accounts.

General Report.

When the sale of the estates and all other matters referred by the decree have, in the judgment of the Solicitor most interested, (or perhaps under the 'New Orders,' of the Master also,) been sufficiently attended to, and the results effected, the Master's *general report* is the next great object in the suit. Which report, being the ground-work of the *final* decree to be made, when the cause is again to be heard on *further directions*, every Solicitor for every party materially interested in it, should be well satisfied that every thing needful has been brought before the Master, and the directions of the decree, generally, carried into effect; this particularly concerns the Solicitor who has the principal conduct of the suit. Any party in the cause may now therefore call upon the Master to make his general report, and for that purpose may bespeak the *draft* of it from the Master. But as it is only in case of delay or neglect on the part of the complainant's Solicitor, whose office regularly it is, that any other party ever deems it proper to interfere on this occasion, the complainant's Solicitor will therefore, as matter of course, do this.(*a*) The proceedings upon the general report are similar to others in the Master's office, and are particularly noticed *post* § 52.

Subsequent proceedings; exceptions to report feigned issue &c.

The further proceedings [ch. 8. 9.] by feigned issue or action at law, [*post* § 54-5.] exceptions to Master's report [ch. 2. § 68.] brought on for the sake of expedition at the time the cause is set down for further directions;

Cause bro't on for further directions; Decretal order thereon; and further proceedings in the Master's office upon the decretal order, upon further directions: Payment of costs; Settlement of draft of conveyance on transfer of stock. Process to compel executors to pay in balance. See [*form to be adapted to* our forms, *ante* § 36. and *post* c. 8. § 77-78. and ch. 9. § 21. both vols.] *of decree* on the reservation on further directions Master to compute subsequent interest on such debts as carry interest, and certain sums of stock to be sold and applied in payment of debts: executor to pay into court what is reported due from him to testator's estate. Consignee of the rents and profits of West India estate to pass his accounts, and out of profits to pay growing interest and arrears of annuities, and tax all parties their costs, which are to be paid by consignee out of profits of estate. Further reservation as to lessee, legacies, &c. Eq. Draft. 656-8. See ib. 640-658. See final decree, Blake 282. and *post* c h. 7. § 5. ch. 8. and ch. 9.

(*a*) 1 Grant 428.

CHAP. II.

are adverted to elsewhere. The hearing upon further directions, or on the equity reserved, may be thus retarded. But if not, the cause is set down upon further directions, and the attention of your counsel is previously drawn to all the necessary points, either agitated throughout the cause, or now to be provided for. The proposed directions are very important to be attended to, so as to avoid the delay and expense of subsequent applications to the court to supply any omissions. The further decretal order on this hearing upon further directions being obtained, to enable you to proceed in the Master's office upon the matters again referred to him upon this further decretal order, you will at once, having completed and passed and entered it, leave in the Master's office, as you did of the decree, a copy of the title and ordering part of this also. And you will in like manner, as on the former occasion, carry these subsequent directions into effect. Perhaps the first object to be *now* attended to may be the payment of the costs of the suit to all parties, up to the hearing, as already taxed. [*ante* p. 123.] This, it is presumed, will be provided for out of the funds standing in the name of the (Assistant) Register, *clerk*, &c. by sale of sufficient part of any stock or fund in the cause, or out of any *unfunded moneys* that may be properly applicable to the purpose, which is often the case, and which, perhaps, sometimes have been providently reserved from investment with that view. It is also probable that stock may be directed to be transferred to a party, upon executing a release or conveyance upon the draft of which the parties differ. If so, the draft is prepared, left, settled and allowed, as in case of purchasers, (*ante*,) the Master's report or *certificate of allowance*, and his *report* certifying the due execution, being filed, the transfer is obtained in the manner more particularly directed hereafter, as well as the proceedings to compel executors to pay in any balance remaining in their hands.

Creditors, mortgagees in possession; coming in under decree; claiming; bate-ment on a deficiency of assets.

It may be added here, that in the course of taking the accounts in the Master's office, it may happen, that one or some of the creditors are mortgagees in possession. In that case the Master cannot examine them upon interrogatories, if they choose to stand upon their security, and not to *come in under the decree*. They, therefore, have

their option, and will consider what, under the circumstances, may be most advisable for them to do. If they do come in, which is by carrying in a *claim*, they *may then* be so examined, for the purpose of eliciting all their receipts and payments, and thence enabling the Solicitor conducting the suit to proceed as in case of executors, founded upon the examination, so as to come at the actual balance due on the mortgage, or to see if the mortgagee has been overpaid, and if the annual *rents* have exceeded the annual *interest* of the security. Another important feature in an executorial or other account in the Master's office (*every* variation of the circumstances of which it is scarcely possible to exemplify,) is the probable occurrence of a *deficiency of assets;* in which case the process of abatement must take place in the Master's office. Legatees are the first objects of this abatement. And if, excluding legatees altogether, the estate be still deficient for payment of simple contract creditors in full, the requisite calculations must be made, and statements carried in to the Master, to enable him to report the fact, and to state the reduced payment to be made (after such abatement) to each creditor.(*a*) See also *post* § 50. for a form of state of facts and *apportionment*.

Subsequent interest. Funds invested for infants and applications on their arrival at age. Enrolment of decrees appeals&c. *post*.

Claims in their nature bearing interest, proved before and allowed by the Master, and included in his report, are entitled to a computation of *subsequent interest*, which the order on further directions will, most probably, have directed to be made by the Master, and that he may be at liberty to make a separate report thereof. A *charge* of subsequent interest is, therefore, to be carried in before the Master by the claimant, computing such interest from the period to which the former report mentions it to have been calculated, to such future period as it is expected the debt may be paid, agreeably with that part of the order on further directions which directs the payment.(*b*) See such *charge*, *post* § 50. When the rights and interest of parties have been ascertained and declared by the decree and order on further directions, some of these may be infants, and not entitled until they come of age to the funds or money, either standing to the credit of the cause generally, or carried over to their par-

(*a*) 1 Grant 411. (*b*) 1 Grant 412.

CHAP. II.

ticular account, such parties, to obtain payment or transfer of such money or funds, must petition the court to have the same transferred or paid.(c) The mode of proceeding in this case will appear hereafter. The subject of Appeals [§ 62. *post*, and vol 1.p. 54.] and enrolment of decrees [§ 83. *post*, and vol 1.p. 83.] will also be found in other places.

Certificates of the Master.

§ 43. Vol. 1. p. 42. Certificates of the Masters generally.

The various occasions for the Master's certificates have appeared in the preceding general outline of proceedings in the Master's office. [see also *post* § 45. 47. 49.] It has been observed, [p. 32.] that great credit is given to the certificate of the Master, as well as of other officers of the court. But they are not all conclusive. The Master's certificate of his having done some judicial or ministerial act, is conclusive, and affidavits are inadmissible against it; but if he certify any act, an occurrence *in pais*, while he was in the discharge of a judicial or ministerial duty, affidavits may be filed to controvert or explain his certificate, or to show that he was mistaken.(a) If Solicitors adhere to the rule requiring their agreements to be in writing, it would exclude very generally any such controversy as to what passes in the Master's office. Some certificates of the *Master* are in *nature* of reports, but distinguished as requiring no confirmation by the court, and as open to *exception* immediately, without previous *objections*, (except on exception to his certificate of the sufficiency, or insufficiency of an examination, see V. 1.p. 45.) or warrants to *settle*, being complete by the Master's signature. All reports are certificates, but all certificates not, *strictly*, reports. Master's certificates are to be filed before they can be acted upon. But (where not excepted to) being by the rules of the court *conclusive* on the subject, and that subject not of such a nature as to found any order or decree upon, they need not the court's confirmation, as all *reports* properly so called do.(b)

No. 1. Certificate of commission necessary for examination of witnesses and non resident creditors in support of their claim. See another form of certificate founded on affidavit of its necessity, for commission to examine witnesses in another county, state, or kingdom, Hoff. 352-3. appx. No. 24.

2. Orders for commission to examine parties or witnesses, form *post*. See also Eq.

(c) 1 Grant 12.

(a) 1 Hogan 83. See effect of certificate at law. 8 Cowen 45.

(b) 1 Grant 161. 2d ed.

Draft. 613-14. *Proceedings* on obtaining certificate of commission to examine witnesses or parties. 3 Form of a *commission* to examine wit. nesses abroad in a foreign language. 2 Newland 284. 281. 283. Do. to take a defendant's examination on interrogatories 2 Newland 286. Notice and other forms executing commission. Newl. 286-291. *Interrogatories &c.* ib. 291. &c. (See *post* § 46, 47.)

No. 1. *Certificate of the Necessity of a Commission to examine Witnesses and Creditors.*

[Title of cause, see p. 78.] In pursuance of the decree made on the hearing of this cause, dated, &c., I have been attended by the Solicitor for the complainant; and the said complainant's Solicitor having exhibited before me a charge on behalf of the several creditors of E. F., Esq. deceased, the testator in the said decree* named, in respect of several debts claimed to be due to them respectively from the said testator's estate on several mortgages; and it being alleged that the said creditors and their witnesses, who can prove such charge, live or reside in the county of D., I certify, that I think it reasonable that a commission should issue there for the examination of the said creditors and their witnesses, returnable without delay, wherein the complainant and defendants may join, if they think fit. Dated the fifteenth day of January, 1830. (*a*)

T. W., Master in Ch'y.

No. 2. *Orders for Commissions to examine Parties or Witnesses.*

For a party—one of the defenants—on interrogatories [vol. 1. p. 45. § 50.] *exhibited by the complainant, before the Master.* The caption, title and commencement may be as directed. [§ 32. *ante*, p. 78, &c.] The order (in England) recites (as appearing on the motion) that by a decree made on the hearing of this cause, it was referred to (A. B.) to take the accounts thereby directed, for the better taking whereof the parties were to be examined on interrogatories as the Master should direct; that in pursuance thereof, the (complainants) have exhibited interrogatories before (C. D.) one of the Masters of this court, who succeeded the said Master (A. B.) for the examination of the defendant (A. K.); and it appears by the said Master's certificate, dated, &c. it will be necessary that a commission should issue to take the said

* Perhaps in all proceedings after a decree, it is more *proper* to say, *in the decree* named, than, *in the pleadings in (or of) this cause* named.

(*a*) 2 Grant 1st ed. 363. See like form, Blake 52. app.

CHAP. II. defendant's examination to the said interrogatories: (the ordering part was,) that she may be at liberty to take out a commission for that purpose, and that the (complainant's Solicitor) may, in *two* days after notice hereof, give the said defendant's (Solicitor) commissioners' names; or in default thereof, that the said defendant may have such commission directed to her own commissioners.(*e*) 2. *For witnesses:* [As before] 'That by the decree made in this cause the —— day, &c. it was referred to ——, one of the Masters of this court, to take the several accounts thereby directed; that it appears by the said Master's certificate, dated the —— instant, that the said defendant had several material witnesses to examine in relation to the said accounts in the county of ——, for which reason the said Master was of opinion it was necessary a commission should issue for that purpose;' (ordering part;) 'that the said defendant may be at liberty to sue out a commission for the examination of her witnesses in the country for the purpose aforesaid, and that the (complainant) and the other defendants may, in *four* days after notice hereof to their, (Solicitors,) join in commission, and strike commissioners' names with the said defendant's, (Solicitor,) or in default thereof, that the said defendant may have such commission directed to her own commissioners.(*f*) 3. *To examine witnesses to prove a creditor's claim, with liberty to examine some of the defendants as witnesses*:— The order, as in form 1. (which was on motion of ——, of counsel with C. W., the son and administrator of the goods, chattels and credits of J. W. creditor of R. J., the testator in the pleadings in this cause named,) after referring to the decree of reference to take the accounts, and that it appears by the said Master's certificate dated, &c. that he had been attended by the said Solicitors for the complainants and defendants, and for the said C. W., and did, at the request of the Solicitor for the said C. W. think proper to allow the said C. W. a commission to prove his charge or claim exhibited before him, returnable without delay; that the said C. W. is advised it will be necessary for him to examine the defendants, E. W. and S. J. as witnesses for him in this

(*e*) Hand's Solicitor's Assist. 135. (*f*) Hand's Sol. Assist. 135-6.

cause, and that the said defendants being no ways concerned in point of interest in the matters in question, (It was therefore prayed, and ordered accordingly,) that the said C. W may be at liberty to take out, &c. (as before,) and that he may also be at liberty to examine on the said commission the said defendants E. W. and S. J. as witnesses for him in this cause, saving all just exceptions.(g)

Proceedings on obtaining the certificate, &c.

A certificate of the Master of the necessity of a commission, whether for the examination of a party residing at a distance, or for the examination of witnesses to falsify an examination of a party before the Master,(b) or for the examination of witnesses generally in relation to matters before the Master, and who are in another county state or kingdom, is necessary, in support of the application for an order that a commission issue. This by the English practice is a motion of *course* (motions of course there being such as are made without notice, obtained, without opposition, but actually *made* by counsel,) and the only remedy the opposite party has, is to apply to discharge the order on notice of motion for this purpose. In the first case, that is, for the examination of a *party* on commission, the order is obtained and served, and the opposite party called upon or notified to name his commissioners to see the examination taken. The interrogatories are prepared, settled, [§ 46.] and annexed to the commission, which on production and entry of the order is made out by the clerk under the seal of the court; upon which occasion the proceeding is in a similiar mode to a commission for taking an answer, [ch. 8. § 40.] and the commission itself is also similary executed *mutatis mutandis*. In the second case, that is for the examination of *witnesses* on commission, the proceedings are in the same manner as in examination in court. [ch. 9. § 6. &c.] The motion and order for commission founded on the Master's certificate for commission to examine witnesses, have here also been deemed of *course*, the order [see *ante* No. 2.] being entered at the register's office on filing the certificate, and subject only to be discharged on motion of the adverse party.(a) But by the revised statutes, commissions to take testimony, whether directed by the Chancellor or Vice Chan-

(g) Hand's Sol. Assist. 136-7.
(b) 2 Cox, 108.
(a) See Hoff. 19-53-55.

CHAP. II.

cellor, or by the Register or Assistant Register or Clerk, under such rules as the Chancellor shall prescribe, must be upon *petition* naming the person to whom the commission is prayed to be directed, and upon such *notice* of the application as the Chancellor by general rule shall direct. [See ch. 9. § 6. &c. vol. 1. p. 317.] Accordingly, certain rules have been adopted; but whether framed with a view to embrace the case of a commission founded on a Master's certificate, appears questionable. But in ordinary cases after issue joined, the petition must be presented to the Register, &c. and in special cases to the Chancellor, but in either case must be upon the usual notice. The statute appears to be imperative, and it also requires the testimony to be filed in the office of the Register, Assistant Register, or Clerk, of the court in which the proceedings in the cause shall have been filed. The mode of returning the commission seems to be still left to the direction of the court, and in the case under consideration should be directed to be returned to the Master by mail or otherwise, [p. 75, 76.] as the parties may agree. [See further on this subject ch. 9. § 6. &c. vol 1. same ch. & §. p. 317-320.] It may be here remarked that a subpœna might be issued into any part of the state, and witnesses compelled to attend; [*post* § 48. but see vol. 1. p. 320.] but the inconvenience, if not injustice, (as no adequate fees are allowed to them) of calling witnesses from a great distance, will render a recourse most usually to a commission, or perhaps in special cases, and upon special application to the court, to a Master in the county wherein the witness resides.(*b*)

§ 44. Vol. 1. p. 43. Production of books, papers or writings.

The production of books, papers, and writings in the custody or power of any party, and referred to in a bill or answer, may on motion it has appeared, [ch. 8. § 51. 53. vol. 1. p. 288-9.] be ordered to be brought into court and deposited for inspection with one of its

(*b*) See 3 J. Ch. 627. and Hoff. 50-1. some useful hints as to the mode of preparing interrogatories and instructions to annex to commission and of executing, and returning the commission and testimony, may be taken from the analogous practice of the law courts, as now regulated by statute. See 2 R. S. 39-36. and 391. See 1 Wend. 18. 27. 65. 283. 6 Cowen, 156. 400. 404. 444. 2 Wend. 71. 627. 646. 9 Cow. 115. 4 Cow. 440. Johns Dig. also Bridgman's Digest 4th vol. But see *post* ch. 9.

officers. A similar power is concurrent in the supreme court, and regulated by statute.(a) The course in that case is by motion on notice founded upon the pleadings that the party bring into court the deeds admitted in his answer (when a defendant); a subpœna *duces tecum* to bring in title deeds and on non-compliance therewith a motion for attachment is not the proper course.(b) If the production is to be made to a Master pursuant to such order on motion, or where a special clause [p. 91.] for that purpose in a decretal order of reference authorises such production, the Master is to exercise the discretion now vested in him by the new order [vol. 1. p. 43.] and accordingly if necessary issue a summons underwritten 'at which time the defendants (or others, as the case may be) A. B and C. D. are to produce and leave with me all books,' &c. (in the words of the decree:) On return of summons further time may be allowed by the Master, or if he refuse, by the court. But when the documents are, first or last, actually brought in and left, they are to be accompanied by an affidavit, as to their being *all* in defendant's possession, &c. And a *schedule* should be annexed, or underwritten, if numerous; but the party is at liberty to seal up such parts as are irrelevant to the matter in question.(c) In case of neglect a certificate of the default is given, upon which a motion of course(d) it is said is first made and an order nisi is entered for their production, or to show cause why attachment, &c. and on becoming absolute, an order for attachment not bailable is obtained on proof of service of prior order. [But see ch. 7. § 6. 37. vol. 1. p. 204. 227.] An affidavit must account for papers withheld. If party is dissatisfied with the production he may file interroga-

CHAP. II.

1. As to affidavit of service of summons see *ante* § 40. p. 96. &c.
2. As to order nisi, see Hoff. 10. 27.
3. Certificate of default in not producing. Hoff. 339. No. 5.
4. Certificate where some are withheld. Hoff. 339, No. 6.
5. Notice of motion for an attachment for not leaving deeds in the Master's office. See form *post*.
6. Affidavit on production, *post* and Hoff. 338. No. 4.
7. Certificate of (deeds, &c.) being left with the Master pursuant to decree—form *post*.
8. Order that Master deliver up

(a) *ante* vol. 1. p. 181. n. 2 R. S. 199, 200. See also 6 Cow. 62. 69. 3 Cow. 17. 18. n. (a) 4 Cow. 399. 5 Cow. 27. 153. 419. 3 Wend. 296.

(b) 1 Hogan 123. As to production of books for inspection of defendant. See 13 Price, 790. 193. See further *as to the production of books, &c.* 1 Paige 611. and authorities cited *ante* vol. 1. p. 43. n. (9) n. (10).

(c) Party not compelled to produce books of account containing entries of his private concerns. 1 Hopk. 424.

(d) 1 Grant 390. Hoff. 9. 13. 27. n.

books, &c. *post.*

9. Do. that Master may deliver out to purchaser the title deeds of the particular lots sold before him, form *post.*

10. Do. to deliver out, to enable defendant to prepare his examination, the complainant being allowed to inspect, and the books, &c. to be returned, when defendant has put in his examination.

tories, or examine the party orally as to the suppression.(*a*)

No. 5. *Notice of Motion for Attachment for not Leaving Deeds in the Master's Office.*

(Title and commencement, *ante* § 14. and p. 42.) Take notice that this court (or the Vice Chancellor of —— &c.) will be moved, *or* that a motion will be made to, &c. on, &c [p. 42.] or so soon after as counsel can be heard on behalf of the defendant H. W., that an attachment may be issued against the above-named complainant, for not leaving all deeds, papers, and writings, in his custody, possession, or power, relating to the matters in question in this cause, in the office of F. C., esquire, the Master to whom this cause stands referred, in pursuance of the decree made herein, bearing date the —— —— 18—. Dated this —— day of ——, 1823. (Signed) To —— Solicitor for complainant,(*b*).

No. 6. *Affidavit on production.*

[Title and commencement, § 7. p. 24. 27.] ——, the defendant in the above entitled suit, being duly sworn *or* affirmed [p. 29.] doth depose and say that neither this deponent,(*c*) nor any person or persons for his use, to his knowledge or belief, nor with his privity or consent, have, or hath, nor ever had, in his or their custody or power, any deeds, papers, or writings, or books of account, relating to the matters in question in this cause, save and except the several deeds, books of account, papers, and writings, mentioned and contained in the schedule hereunto annexed.(*d*) (§ 8. p. 23. jurat.) (Signature.) (*e*)

(*a*) See further, Hoff. 9 13. 27. n.
(*b*) 2 Grant 175.
(*c*) It is said, the affidavit should be positive, without qualifying words, such as to defendant's 'knowledge,' 1 Grant 390 Hoff. 9.
(*d*) And (if so) this deponent further saith that such portions of the book marked in the schedule with the letter A as are sealed up, do not relate to the matters in question in this cause.
(*e*) Grant 13.

No. 7. *Certificate that Deeds, &c. are left.*

In pursuance of a decree made on the hearing of this cause, bearing date, &c., I have been attended by the Solicitor for the complainant, and by the defendant C. D., and by his Solicitor; and the said defendant hath this day produced before and left with me several [deeds, evidences, and writings,] by affidavit and schedule, and hath by the said affidavit made oath, that he hath no other, &c. in his custody or power, concerning the matters in question in this cause, than what are mentioned and set forth in the said schedule, save and except as in the said affidavit is excepted; all which I humbly certify to this honourable court.(*a*) D C. Master in Chancery.

No. 8. *Order on Motion, &c. or by Consent that Master re-deliver Books and Papers.*(*b*)

(Caption, title, and commencement of order on motion or petition § 32. *ante* p. 78. 84.) —— whereby it appears, that by an order made in this cause the —— day of ——, it was referred to Mr. ——, one of the Masters of this court, to take an account of all dealings and transactions between the complainants and the defendants, and for the better taking of which accounts the parties were to produce before the said Master, upon oath, all books, papers and writings, in their custody or power, relating thereto: that in pursuance of the said order, the complainant ——, and the defendant, ——, left with the said Master several books, papers, and writings, and the parties have since come to an agreement that all books, papers, and writings, produced by the parties, shall be delivered out to the said defendant ——. It is accordingly ordered, that all books, papers, and writings, produced by the said complainant —— and the said defendant ——, before the said Master,

(*a*) 2 Grant 315.

(*b*) After the specific purpose for which deeds, papers, and documents are ordered to be brought into the Master's office, shall have been answered, the party who brought them in is entitled on motion to have them delivered back to him. But the court of Exchequer, not unanimously, in one instance where deeds were brought in, in a suit for specific performance, but under the peculiar circumstances, departed from the general rule, on the ground that the order was matter of regulation, the defendant having an interest in retaining them for the purpose of a defence in the same suit, as to another contract, and having paid the purchase-money and interest into court. Bowyer vs. Green, 13 Price 250.

CHAP. II.

and now remaining in the said Master's office, may be delivered out by the said Master to the said defendant ——, *or* on reading and filing a petition, dated, &c. [§ 32. p. 79.] setting forth, &c. and all matters in question having been amicably settled, and agreed by and between the petitioner and the said defendant, and the said defendant's Solicitor having signed his consent to the prayer of the said petition. It is ordered that all deeds, books, papers, and writings, produced and left by the petitioner before the said Master, in pursuance of the said decree, be delivered back by the said Master to the petitioner.(*b*) If in fact the order be by consent it is a common order entered as directed [§ 31. *ante* p. 75. and vol. 1. p. 36. 35.]

No. 9. *Order on Motion that the Master deliver out to Purchaser Title Deeds of Estate sold before him.*

(Caption, title, and commencement, § 32. *ante* p. 78.) A motion having been made by Mr. ——, of counsel for Mr. A. W. &c. [see p. 84-5. 80.] grounded on a certificate of, &c. affidavit, &c., whereby it appears that by a decree made on the hearing of this cause, the leasehold estates in question were directed to be sold with the approbation of Mr. ——, one of the Masters of this court, to the best purchaser or purchasers that could be got for the same; in pursuance whereof the said estates were put up to sale before the said Master, in lots, and the said A. W. was reported, and stands absolutely confirmed the best purchaser of lot No. ——, at the sum of ——, and pursuant to an order of court paid his said purchase money (into court) to the credit of this cause; that the title deeds and writings relating to the said lot are in the said Master's office, together with the title deeds and writings relating to the other lots, the same being brought before and left with the said Master pursuant to the said decree: (and on reading and filing an affidavit of due service on the complainants and defendants, of copies of said documents and notice of the present motion, and on hearing ——, of counsel for ——, in opposition to said motion, *or* no one appearing to oppose, &c.: *ante* § 32.) IT IS ORDERED, That the title deeds and writings relating to

(*b*) Slightly altered and adapted to our forms, from 2 Grant 272-3. 2d ed.

the said lot No. ——, remaining in the said Master's office, be delivered out to the said A. W. the purchaser of the said, or to Messrs. —— and ——, his Solicitors.(*d*)

No. 10. *Order on Motion to deliver out Books, &c. to enable Defendant to prepare his Examination.*(*a*)

(Caption, title and commencement as before, § 32.) The recital in the order was: that it appeared from affidavit of defendant, that interrogatories for his examination had been exhibited before, &c. touching his accounts as executor of, &c.; that the interrogatories required an account of all receipts and payments as executor, &c., which extended to the sum of ——, and upwards, that defendant had no other account thereof than what was contained in the book, &c. produced and left, &c., and without which he could not put in his examination; that it would be extremely injurious to his business and concerns if he were subjected to attend at the Master's, and would not be practicable for him to do so within the time allowed. *The ordering part* was: that the *cash book, ledger, and two letter books kept by the defendant J. H. as executor of W. C. Esq. as aforesaid, together with his receipt books and vouchers*, which have been by him produced, and left in the office of the said Master, be delivered out to the said defendant, to enable him to prepare and put in his examination to the said interrogatories; and 'it is further ordered: that the plaintiffs be at liberty to inspect the said books and papers, so to be delivered out to the defendant, whilst they are in his custody, at all reasonable times, upon his giving reasonable notice; and when the said defendant shall have put in his said examination, it is further ordered, that he do return the said books and papers to the said Master, in the like state and condition as they are when delivered out.'(*b*)

Interrogatories and Evidence.

All *accounting* parties may be examined *by any other party* not satisfied, upon interrogatories as the Master

§ 46. Vol. 1. p. 48. Interrogato-

(*d*) 2 Grant 271-2. The formal parts altered and adapted to our forms.

(*a*) This perhaps is unnecessary, as the Master is now empowered to direct the production and inspection of the books, &c.

(*b*) Hand's Solicitor's Assist. 137-8.

CHAP. II.

ries and evidence. Interrogatories: First, for examining *accounting* parties; *secondly parties generally*; *Thirdly*, witnesses. 1. For *accounting* parties: *Form* of interrogatories for examination of a defendant, executor, and trustee, as to testator's real and personal estate. See other *forms* referred to *post*, 4. references to forms and evidence under the heads of 'accounting' 'executors,' 'parties,' &c. 2. *For parties* generally, or *not accounting* parties. See marginal notes, *post*. 3. For witnesses, see marginal

may direct. [vol. 1. p. 45.] *Interrogatories* for that purpose, or for the examination of *parties generally* (but not *witnesses*) in a cause, are settled by the Master, although prepared by the Solicitor, and sometimes settled by counsel, though not allowed, it is said, in strict costs.(*a*) By the new order [vol. 1. p. 43. § 46.] any witness or *party* (generally,) or any creditor, or other person coming in to claim, may be examined upon written interrogatories, or *viva voce*, or in both modes.

1. A complainant therefore (or any *other*(*b*) dissatisfied party) is at liberty to examine the defendant. If on due investigation the accounts brought into the Master's office [p. 104.] should not be considered sufficient, interrogatories as observed [p. 105.] must then be exhibited, on which the defendants are to be examined as to their receipts and payment. These interrogatories are therefore to be left in the Master's Office, and proceeded upon in the usual manner. The receipts and payments are meant to be such as have occurred subsequently to the defendants putting in their answer, and is intended to be a continuation of the accounts kept by them of their testator's affairs. Should the decree direct inquiries into any other facts or circumstances within the executor's knowledge, the interrogatories may extend to them also. In such case, however, the interrogatories in respect of any special matter must necessarily be constructed to meet the peculiarities of the case, and would undoubtedly require the sanction of counsel. The form of interrogatories, therefore, now given is confined to those usually filed against executors under a decree for passing an executorship account. These may be considered *standing interrogatories*, and are settled by the Master, but prepared by the Solicitor.

(*a*) 1 Grant 261. 384.

(*b*) Prior to the late order, in the examination of defendants, executors, an interrogatory has, upon the suggestion of a co-defendant, been ordered to be added to the *standing* interrogatories of the Master's office, to ascertain whether the defendants, the executors, were indebted to the testator upon any and what account. 13 Ves. 262.

notes, and *post*, &c. 4. Interrogatories, and evidence, alphabetically arranged.

A fee to counsel is not, in England, allowed for settling them, his signature not being required.(*a*)

Interrogatories for Examination of a Defendant, Executor and Trustee, as to Real and Personal.(*b*)

In Chancery:

(Title of cause.)

Interrogatories exhibited on the part of the said complainant before J. J., esquire, one of the Masters of this court, to whom this cause stands referred, for the examination of the defendant A. B., pursuant to the decree made on the hearing of this cause, bearing date the —— day of —— 18—.

First interrogatory.—Did you, or did you not, or some persons or person, by your order, or for your use, upon the death of H. H., the testator in the pleadings of this cause named, enter into the receipt of the rents and profits of the said testator's freehold estates; or of some, and what part thereof; If yea, have you, or have you not, or some persons or person, and who, by name, by your order, or for your use, received divers sums of money, for or in respect of the rents and profits of the said testator's freehold estates; or of some, and which of them? If yea, set forth a just and true account of all and every the sums or sum of money received by you, or by any persons or person, and by whom, by your order, or for your use, as well previous as subsequent to the time of putting in your answer in this cause, for or in respect of the rents, issues, and profits of the said testator's freehold estates, or of any part thereof; and when such sums of money, and every of them, were received, and from whom, by name, and for what estates in particular, distinguishing the devised from the descended(*c*) estates of the said testator; and the times when such sums of money, and every of them, accrued due and became payable; and also a true and just account of all and every the sums of money, if any, which now remain due and unreceived; and from whom, by name, for or in respect of the said estates, and for what estates in particular, declare, &c.

Second interrogatory.—Have you, or have you not

(*a*) 1 Grant 384.

(*b*) As *executors* merely. See Hoff. 340-1 and *post* 4.

(*c*) Qu.? But such is the English form.

CHAP. II.

paid, expended, disbursed, or allowed, any sum or sums of money, for or in respect of the said testator's freehold estates, or for or in respect of any part thereof? If yea, set forth a true and just account of all and every the sums and sum of money so paid, expended, disbursed, or allowed by you, and the times when, and to whom, and for what, and upon what account, such sums of money, and every of them, were so paid, expended, disbursed, or allowed; and for what estates in particular, distinguishing the devised from the descended estates of the said testator, declare, &c.

Third interrogatory.—Was the said H. H., the said testator, at the time of his death, possessed of, entitled to, or interested in, any and what goods and chattels, leasehold estates, property in the public funds, government debts or debt, sums or sum of money, or other personal property and effects whatsoever (other than and besides what is mentioned and set forth in your said answer?) And have you, or any persons or person by your order, or for your use, possessed, got in, or received any and what goods or chattels, leasehold estates, property in the public funds, government securities or security, or any and what debts or debt, sums or sum of money, or other personal property and effects of or belonging to the said testator at the time of his death; or any and what other sums or sum of money arising or produced from any personal property or effects of the said testator? Set forth a full, true and particular account of all the goods, chattels, leasehold estates, property in the public funds, government securities, debts, sums of money, and other personal property and effects whatsoever, which the said testator was at the time of his death possessed of, entitled to, or interested in (other than and besides what is mentioned and set forth in your said answer,) with the particular natures, kinds, qualities, quantities, full, true, and utmost value thereof respectively, distinguishing what parts or part thereof were or was possessed, got in, or received, by you, or by your order, or for your use; and whether any and what parts or part thereof were or was sold or disposed of by you, or by your order or authority; and when, and how, and to whom, and for what respective sums or sum of money have you, or any persons or

person, by your order, or for your use, received any and what sums or sum of money, which accrued due after the said testator's death, in respect of interest for any sums or sum of money, due to the said testator at the time of his death, or in respect to the rents of any leasehold property, or in respect of any dividends or interest of bank stock, or government or other public funds or sesurities belonging to the said testator's estate? If yea, set forth a full, true, and particular account thereof, and of every part thereof; and do or doth any and what parts or part thereof still remain outstanding; and why, and in whose hands or possession, and from whom due; declare the same according to the best and utmost of your knowledge, remembrance, information and belief; [*or*, 'declare the truth of the several matters by these interrogatories inquired after according,' &c.]

Fourth interrogatory.—Whether or no was the testatator H. H. at the time of his death, indebted to any persons or person in any and what sums or sum of money? If yea, set forth a particular account of all and every the debts whatsoever, other than and besides what are mentioned and set forth in your said answer, which were then justly due & owing from him, and to whom, & for what, and on what security, if any, the same were respectively due; and whether any and what sums or sum of money have been paid by you, or by your order, in or towards the discharge of all or any, and which of such debts; and when, and to whom, and for what, and the amount thereof in the whole. Have you since putting in your answer paid any and what sums or sum of money, for or on account of the funeral expenses and legacies of the said testator, or otherwise in relation to his estate? If yea, set forth a particular account thereof; and when, and to whom, and for what, all and every such sums or sum of money were or was respectively paid, and the amount thereof in the whole. Set forth the same according, &c.(*a*)

The interrogatories, when drawn and fairly copied, are left in the Master's office to whom by the decree the cause is referred, a copy served on the opposite So-

2 Grant 303-5. *See post* § 47.

CHAP. II.

licitor [p. 101.] and usually, but unnecessarily, with notice(*a*) of the filing of the interrogatories. A summons,(*b*) the mode of serving which has been directed, [§ 40. p. 96, &c.] is then taken out, *under-written* 'to settle the draft of the interrogatories left for the examination of the defendants, the executors.' On the *return* of it, when you attend the Master, he will proceed to settle the interrogatories. This was not formerly done until all necessary parties attended, unless on a peremptory summons; yet by the new orders every summons is peremptory, and the Master may at once proceed *ex parte* on non-attendance of the parties served, and on affidavit of service. [p. 97, &c.] But if the parties attend, and there be no particular difficulty or objection raised, the Master proceeds to *settle* and allow(*c*) the interrogatories very much of course, especially if the suit be amicable. Objections to interrogatories settled by the Master must (in England) be by exceptions to the Master's certificate of allowance, not by petition.(*d*) Such certificate is there obtained and filed; but it has been here deemed useless, and that exceptions to it will not lie, as the party objects upon the Master's certificate of the sufficiency or insufficiency of the examination.(*e*) Exceptions may in the latter case be made, but the parties are confined to the objections taken before the Master. [vol. 1. p. 45. and *post* § 49.] When settled, the interrogatories as settled, are copied and served, and the examination conducted as hereafter mentioned. [§ 47.] Interrogatories may also be excepted to for impertinence or scandal, and without any order of reference, warrants taken out, and the exceptions determined by the Master. [*post* § 49. and vol. 1.]

2. Any defendants in the cause, besides the executors, may be examined before the Master to prove mat-

(*a*) Hoff. Mast. 6. 21-5. Bla. 230-1. 233. In Eng. no copy is served but a warrant on leaving, taken out, underwritten 'The plaintiffs have left a draft of Inter. for the exam. of the defendants, the executors,' then a warrant to proceed 'to settle &c., as in other cases, taken out and served.

(*b*) Hoff. 26. Bla. 234.

(*c*) How settled, Hoff. Mast. 21.5. 33. Bla. 231. see 284. *form* of allowance Hoff. 340. No. 7. see Bla. 233,4.

(*d*) 6 Ves. 459. 2 J. Ch. 499. Bla. 249.

(*e*) Hoff. 22-5.

ters within their knowledge, as may witnesses also, in matters arising out of the cause, and parties may be examined as witnesses. *Interrogatories* for the examination of *parties* generally, not strictly *accounting* parties, or for creditors coming in, (and in either case they may as we have seen be also examined *viva voce*) are prepared, copied, left, served, and settled, and a new copy of those settled, served, as in other cases.(*a*) The forms and proceedings upon such examination, also, will be referred to. [§ 47.]

Parties generally: see *post* 4. 'Parties,' 'Pro interesse suo' Partners,' 'corporators' 'interrogatories' &c.

3. Parties as well as persons not parties may be examined *as witnesses*,(*b*) either before the Master or an examiner, [ch. 9. §. 6. 12.] or on commission, [*ante* § 43.] and if out of the state, *must* except by consent, be examined on written, direct and cross interrogatories, allowed by a Vice Chancellor, or Master, and annexed to the commission. (vol. 1. p. 320. ch. 9. § 12. and *post*.) But witnesses may be examined before the Master on interrogatories or *viva voce*, or in both modes, [vol. 1. p. 43.] as the nature of the case requires,(*c*) and if on interrogatories these

Witnesses: parties or others as such. See 4: 'witnesses' 'parties.' *post*. Interrogatories, &c. how settled, and preparing steps

(*a*) See as to examination of parties references, vol. 1. p. 302. 320. Hoff. 13-36. 1 Johns Dig. 356-7. 363. &c. Order or decree for, on hearing motion, or petition, Eq. Dr. 593 613-14. 571. 588. 628. and Hoff. 13, 14. 17 20. 31. 21, 25. 33. For plaintiff to examine defendant or defendant to examine plaintiff, or co-defendant, ib. 13, 16. 17. There is a material distinction between examination as *party* and as witness, ib. 17,20. See *form* interrogatories for plaintiff to examine defendant Hoff. 340. No. 8. and *vice versa*, Bla. 105. appx. see Bla. 230 2 5. As to commission to ex. parties, see *ante* § 43. Hoff. 29, 30.

(*b*) When a party examined as a witness, distinction between examining a party *as party*, and as a witness. Hoff. 18, 20. The Master cannot examine a party who has been examined in chief, as a witness without a *special order*, Hoff. 17. nor one defendant as witness for a co defendant, ib. nor the plaintiff as witness for defendant without the consent of plaintiff. Hoff. 19 nor can plaintiff examine co plaintiff as witness. Hoff. 20. See as to order of *course after rule to produce witness*, in ordinary examinations, for examination of defendant against co defendant or complainant, [ch. 9. § 12. vol 1. p. 320.] and *post*, 4. 'parties.' Parties at law are examined or sworn, in a few instances only, see ib. 'Parties.'

(*c*) Mode of examining by interrogatories in England, and here also orally, Hoff. 21 22. &c *form* exam. of party defendant as witness, Eq. Draft. 490. 554. See in terrogatories for witnesses *post* 4. See further as to *viva voce* or interrogatories Hoff. 33. 34. 40-63. 325-336. Bla. 248 250. 251. 261-2. n. *Forms, interrogatories*, &c. Hoff. 340. No. 8. and note, 346 7. and Bla. 252. 132.; also appendix, 99, 101 103. 8. appx. See Johns Dig. 356. 363.

CHAP. II.

for examination, cross interrogatories, order on motion or petition for an interpreter or translator to attend.

are not settled by the Master, but by counsel,(*d*) unless in the order they are required to be so by the Master, and *approved* of by him.(*e*) Exceptions or objections are taken, (*ante* p. 107.) and if for impertinence(*f*) or scandal, disposed of as mentioned. [*post* § 49.] When settled they are copied, served, notice of six or ten days (if adverse party reside more than fifty miles off, see vol. 1. p. 321.) for examination, notice of names, places of abode, additions of witnesses, instructions given to Master and a course similiar to examination before an examiner, [ch. 9. § 6. 11. 13.] pursued. (*g*) But on commissions *out of the state*, no notice of the time and place of examination, or list of witnesses is required. [ch. 9. § 13. 16. vol. 1. p. 321. 323.] The defendant may file and serve cross interrogatories, and give the like notice, and for the same time, [vol. 1. p. 321.] as that upon the direct interrogatories, *mutatis mutandis*.(*h*) The proceedings upon the examination will be further adverted to. [*post* § 47.] If foreign witnesses are to be examined, or foreign exhibits translated, an order on motion, or petition may be obtained for the appointment of an interpreter or translator to attend the Master.(*i*) Before we proceed to the subject of examinations before the Master, it may be useful to glance at the leading rules of evidence—a knowledge of which is essential to a correct preparation of the interrogatories, as well as the examination of witnesses. Various English forms of interrogatories are referred to, [*post*, p. 166. &c.] but the rules of evidence on which some of them are founded, are in some important particulars, very different in England and in this state.

Interrogatories and Evidence.

4. Interrogatories and Evidence: Al.

Generally speaking, the *rules* as to evidence are the same in equity as at law, though differing in particular cases where *fraud* is charged by a bill, or in cases of *trusts*,

(*d*) Grant.
(*e*) Hoff. 22. 25. Bla. 249. 222. 2 J. Ch. 499. see *ante* as to excepting or objecting to the allowance of interrogatories if by a Master.
(*f*) See Hoff. 325-6-8. 335. and appendix, No. 57. 27.
(*g*) Hoff. 329. 333. Bla. 250. *form* of notice of names, &c. 254. 142. instructions, ib. 143.
(*h*) Bla. 250. 136. *form*, ib. 254. See Hoff. 329. 336. 333. 5 J. Ch. 191.
(*i*) S orders, Eq. Draft. 632. 621. ee

phabetical references to *forms* and to the rules of evidence.

as to which courts of equity do not confine themselves within such strict rules as at law, but enter into the merits of the case, in order to come at a fraud, or to discover the real intention of a trust or use. Some general rules concerning testimony have been established, the notice of which may be found useful in practice, of which the following may be considered to be leading positions: The evidence produced by either party must be *confined to the points in issue*, and every proof bear directly or indirectly upon the facts in dispute. The *affirmative* of the issue is to be proved, and the burthen of proof is cast upon the affirming party. The *best* evidence the nature of the case will admit of must be produced, the withholding of which creates suspicion against the party who, instead of it, produces an inferior proof, such as a copy (or alleged copy) of an instrument instead of the original, in which, if produced, there *might* appear something unfavourable to his pretensions: but if the *impossibility* of this production is *shown*, the rule relaxes, and admits the *secondary* evidence of the *copy*, which *then* becomes the *best*. But in cases of deeds, &c. in the hands of adverse party, application must be proved to have been made, or notice given, for the production of the document, the refusal of complying with which opens the way for such secondary evidence. A distinction also is made between the *best evidence* and the *strongest possible assurance* of a fact, the latter of which is not always required; on other occasions also the rule is sometimes dispensed with on the principle of public convenience: and the admission of a fact is held to be a sufficient substitute for strict and regular proof. *Hearsay* of a fact is not evidence, generally speaking: but this allows of some qualification in particular cases, in which it has been admitted to confirm the testimony of others; or in questions of pedigree, prescription, or custom, or legitimacy, or the state of a family, which, depending often on *reputation*, and incapable of direct and positive proof, this species of evidence has also been admitted. But evidence of this description, such as declarations made by a deceased member of a family, must be shown to have been prior to the suit, and even any controversy which led to it. It is obvious that many cases, falling within some of the foregoing rules, are of the description

CHAP. II.

of *presumptive* evidence;(*a*) the application of which, as well as the other species of evidence, will in some degree be perceived upon referring to the following authorities, the subjects of which are, for convenience of reference, arranged alphabetically. The doctrine of evidence at large would be entirely beyond the limits of any treatise of the present description. But to prepare interrogatories, or examine witnesses understandingly, the leading rules of evidence, as sanctioned by our own statutes and decisions in particular, should be familiarly known to the Solicitor. A more extensive knowledge must be derived from the works of Gilbert, Peake, Phillips, Starkie, Roscoe, &c. For forms of interrogatories, the references are principally to Newland's Practice Equity Draftsman, and Collection of Interrogatores, (Dublin edition)

Abode, 2 Newl. 313. 315. *Absence* 7 years presumptive evidence of death, 1 R. S. 749. 2 Cow 533. argo. *Accomplices* in gaming, &c. 1 R. S. 663. *Account*, and accounting, in Chancery, 1 Johns. Dig. 160-6.; by guardian, ib. 253.; committee, ib. 307-8.; agent, ib 370; trustees, ib. 391.; mortgagor and mortgagee, ib. 323.; by executors and adm'rs, 1 Johns. Dig. 240. Eq. Draft. 503 507-8.; of rents, &c. ib. 512. See executor, testator. *Account books*: Eq. Draft. 476. 2 Newl 308 Coll. 266. 302. 380. 157. 12. 35.; *partnership accounts*, Eq. Draft. 348.; *balance of*, ib. 569. Coll. 155. Accounts settled or allowed, 2 Newl. 308. 310. 407. Coll. 89. 1 Paige 13. 601. *Acknowledgment*, see admissions, deeds, wills. *Admissions, acknowledgments, confessions*: of bond, &c. Eq. Draft. 519; of deed, 1 Johns. Dig. 499, 500. of mortgage, ib.; of mortagee, 5 Cow. 617.; of debt barred by statute of limitation, 2 Johns. Dig. 121-4. 7 Cow. 650-9 ib. 674.; of accounts (see Account): of tenancy, 1 Johns. Dig. 527-8; of co-tenant or in common, parties in suit, 4 Cow. 483; of answer to bill, &c. 4 Cow. 617. (see Answer); of agent. 8 Cow. 215. 6 Cow. 90. 1 Wend. 185.; of partners, 4 Cow. 483. 7 Cow. 650. 9 Cow. 420.; of executors, 3 Cow. 611., 4 Cow. 445.; grantor, ib. of corporator; 3 Cow. 611. vendor, , 7 Cow. 782.; *Administration entries*, Eq. Dr. 491.; Administrator, 1 Johns Dig. 233. 619-627.; see executor, letters of, &c. Advancer of ship supplies, 7 Cow. 670., *Adverse possession*, 1 Johns Dig. 533-7.; *Advertisement* of partnership, Eq. Dr. 544.; see affidavits; of sale, 7 Cow. 13. *Affidavits*, 7 Cow. 596.; 2 Johns Dig. 257-8.; to perpetuate, 2 R. S. 399. *ante* vol. 1. p. 94. *post* ch. 3. § 11. &c.; of

(*a*) 1 Grant 179-80.

printer, 2 R. S. 403.; abroad, 2 R. S. 396.; of limited partnerships, 1 R. S. 764 5. *Affirmations*, 2 R. S. 407-8. *Age* of children, Eq. Dr. 554. *Agency, agents, authority*, Eq. Dr. 481 483. 498. 504. 525. 527-29. 532-33. 555. 556-58. 564.; 2 Wend. 306-7. 308.; Coll. 32. 118.; 6 Cow. 90.; 1 Paige, 13; 1 Cow. 251.; 6 Cow. 701.; 7 Cow. 74. 88.; 1 Johns Dig. 602. 369. 370. 2 ib. 309-11. *Agreement*, 1 Johns Dig. 167. 174-6.; Eq. Draft. 480. 564-65.; Coll. 152.; for a purchase, Eq Draft. 526-7.; for a sale made at auction, ib. 527-8.; for partnership, ib. 543.; for passage, ib 553.; for inclosure, ib. 561.; for a lease, ib. 565.; when evid. of agreement must be in writing, 1 Johns Dig. 175. 248. 645-651. *Allowance*, see admission of accounts, &c. *Ambiguity*, 14 J. 1.; 11 J. 201. 4 J. Ch. 608.; 10 J. 524.; 9 Cow. 140. *Ancestors*, as to them, Eq. Draft. 492. *Ancient deeds*, wills, &c. Eq. Draft. 566.; 7 Cow. 431.; 6 Cow. 178.; 5 Cow. 123. 221. *Annuity*, payment of, Equity Draftsman, 565.; value of, Equity Draftsman, 460.; Coll. 267. *Answers to bills* in chancery, 2 R. S. 174-5. see *ante* vol. 1. p. 277. 313.; 3 Wend. 637.; 4 Cow. 617.; 1 Cow. 711. 744. argo. *Answer* to interrogatories as to rents and profits, Eq. Draft. 511. *Articles of co-partnership*, Eq. Draft. 541. 543. *Assignments* of insolvent debtors discharged, 2 R. S. 38.; see 1 Johns Dig. 191-3. 2 ib. 24-6.; 7 Cow. 650.; by bankrupt fraudulent, Eq. Draft. 533.; solvency of bankrupt, ib. 540. *Assignment and re-assignment*, 5 Cow. 216. *Attendance*, how compelled, see witnesses. *Attorney*, see agency and solicitor. *Auction sales and Auctioneer*, Eq. Draft. 483. 527-8. 532. *Authority*, see agency.

Bail, cannot be witness, 3 Wend. 376.; nor wife of, ib. *Balance* of partnership accounts, Eq. Draft. 569. *Bank* stockholder, 2 Cow. 770. *Bankrupt*, as partner, Eq. Draft. 535.; his estate, Eq. Draft. 537.; fraudulent assignment by, ib. 533. 540. *Bankruptcy*, see Fraud. *Baptism*, Eq. Draft. 523. 554. 2 Newl. 297-8. Coll. 91. *Best Evidence*, see 9 Cow. 30. *Birth*, registry, &c. Eq. Draft. 490. 492, 493. 523. 554. 2 Newl. 312-13. Coll. 83. 109. 5 Cow. 237. *Bond*, deed, &c. existence, proof, account of, &c Bla. app. 99. 101.; witnesses dead, 2 Newl. 291. or living, ib. 292. Eq. Draft. 518, 519. 523. 555.; why executed, ib. 568.; consideration of, Eq Draft. 552. 555. 568.; what received on it by executor, Eq. Draft. 522-3. *Bond debt* paid off, 2 Newl. 297.; bond by debtor, 4 Cow. 717. *Books* of accounts, Eq. Draft. 476.; of trade bills to prove the business of a co-partnership, ib. 542.; entries in, see Entries, ib. 119. *Borrower* an assumed agent, 8 Cow. 60. *Boundaries*, description in deed, and when explained or how located, 9 Cow. 125. 6 Cow. 369. 706. 702 to 722. n. 7

CHAP. II.

Cow. 728. 761. Eq. Draft. 568. See quantity, estate, location. *Broker*, wit. 7 Cow. 174. *Brother*, if sole next of kin, 2 Newl. 299. *Burial*, registry. &c. Eq. Draft 490. 2 Newl. 297-8. 5 Cow. 237. 314.

Canal Maps, see office copies certified. *Canvass* of election, 1 R. S. 118.; 9 Cow. 169. *Captain*, as to passenger, Eq. Draft 562. *Cashier* of bank, 5 Cow. 153. 419. *Certificate*, of public officers, see office copies certified. Mode of certifying and when with seal, 2 R. S. 403-4.; (see comptroller, secretary of state,) of officers having custody of papers, of search and loss, &c. 2 R. S. 562.; of sheriffs sales, and certified copies, presumptive evidence, &c. 2 R. S. 370.; of justice, 6 Cow. 261.; in cases of limited partnerships, 1 R. S. 764-5.; 4 Cow. 282. *Certificate* of ack. or proof of deeds, mortgages, 1 R. S. 759. 761. 764-5.; 1 Johns Dig. 499.; see 9 Cow. 13. 94. 120.; 1 Wend. 406. see deeds. *Cestui que trust*, 1 Wend. 625. *Certified copies*, (see certificates, office, &c.) *Character* for truth impeached, see credit, witness, impeachment, 7 Cow. 263.; 5 Cow. 314. *Charge* on the estate, Bla. ap. 100.; 1 Johns Dig 620. 167-8. *Check*, broker, wit. 7 Cow. 174. *Children* and issue, identity and proof of, Eq. Draft. 492-3. 524. 554.; ages of, ib. 554.; legitimacy of, 2 Newl. 312. *Circumstances* of a person, whether good, &c. Coll. 85. 229.; of deceased, Bla. 107. ap.; Call. 9. 39. *Clerks*, see exemplification, records, office copies, clerk of bank, 5 Cow 153. 419 *Client*, fees, 9 Cow. 57. *Club*, or society, members of, Coll. 318. *Code Napoleon*, 3 Wend. 173. *Co-debtors*, against debtor sued, 9 Cow. 44. *A co-obligor*, wit. to prove the terms, &c. of a joint and several bond, 3 Wend. 380.; co-trespassers wit. 6 Cow. 313. 7 Cow. 344. *Commission*, testimony under, see *ante* p. . *Common*, tenant in, 1 Johns Dig. 383.; 2 ib. 398. *Comparison*, of hands, *alone*, inad. 9 Cow. 94. *Complainant*: 'parties.' *Competency*, see credit and competency, witnesses. *Comptroller's* certificates and conveyances, 1. R. S. 420.; see office copies certified, manner of proving documents from, 4 Cow. 587. *Concessions* or admissions for compromising, 8 Cow 201. *Conclusive evidence*; see probate, set off, revised statutes, letters testamentary and administration. *Conditional* testimony, 2 R. S. 391-3. See de bene esse. *Confessions*, (see admissions, concessions,) 3 Cow. 611.; dangerous, 1 Wend. 625.; subsequent not to explain former, 4 Cow. 617.; of members of corporation, 2 R. S. 407.; not as to execution of *sealed* instrument, otherwise as to unsealed, 2 Wend. 576.; 2 J. 451.; 16 J. 201. *Confidential communications*, (see witnesses) 2 R. S. 405-6. Physicians, clergymen, ib. counsel, *interpreter* and perhaps, clerk of counsel, only are privileged, 2 Cow, 195.; 3 Wend.

337.; a person who overhears, must testify, ib. *Consideration*, of sealed instruments, 2 R. S. 406.; of bond, deed, &c.; see 7 Cow. 360. 322.; 6 Cow. 62. 684.; 1 Johns Dig. 124-5.; Eq. Draft. 552, 566.; Bla. ap. 101.; 2 Newl. 298. *Contempt*, interrogatory, charging, Bla. 106. ap. *Conversation*, Eq. Draft. 482. *Conveyances*, acknowledged, proved, &c.; 1 R. S. 758-9. 761.; see deeds, consideration, certificate, exemplificaion, fraudulent, records; Conveyance and consideration, Eq. Draft. 566.; by comptroller, 1 R. S. 420. *Co-partner* and *co-partnership*, (see partnerships and partners) co-partnership, 1 Wend. 148.; Coll. 89. 123.; what proof of limited partnership, 4 Cow. 282.; 1 R. S. 764-5.; co-partner, when wit. for partner, 3 Cow. 84.; when not, 3 Wend. 240.; see 9 Cow. 631. *Copies*, of deeds, records, &c. Bla. 107. ap.; 2 Newl. 294. (see foreign) of registers of baptism, &c. 2 Newl. 298.; letters in letter book, ib. 300. or of an original letter sent, notice being given to produce it, 6 Cow. 90.; maps copied from surveys burnt, 9 Cow. 125.; copies of registers of baptism and burial, 2 Newl. 297-8.; of register of vessel, how authenticated. 1 Wend. 561.; of entries in transfer book of stock, 2 Newl. 304-5.; copies, see office copies, certificates, exemplified copies. *Corporations*, see 1 Johns. Dig. 197-9. 571. (see fraudulent) how proved, 3 Wend. 296.; 1 Wend. 555.; 9 Cow. 140. 194.; or its officers, 7 Cow. 234.; or agents or corporators, when witnesses, 1 Paige 37.; 3 Wend. 296.; 2 R. S. 405. s. 81, 80.; against their corporation, ib. 407. (see admissions) violating, restraining act, &c. 2 Cowen 678,; 7 Cow. 546.; judgment quo warrant in evidence. 8 Cow. 707.; debt due them, 2 Cow. 664. (see presumption,) books of, as evidence, 1 John Dig. 571. County clerks, see records, &c. office copies. *Cross* interrogatories, Bla. 254.; Eq. Draft. 571.; of corporators or agents, 1 Paige 37.; witness asked as to the particular person he had heard impeach the character of another witness and grounds of such impeachment, 7 Cow. 263.; 4 Wend. 232. *Credit, credibility, character, competency, and credit*, of witnesses: (see witness) 5 Cow. 153.; 2 Wend. 555. 527; see Bla. 151.; 1 Johns Dig. 228-230. 603. 591-602.; 7 Cow. 263.; 9 Cow. 797. 1 Paige 18. 9 Cow. 65; 1 Johns Dig. 396-8-602-3.; 2 R. S. 408. 701. 686.; 6 Cow. 484. 497; 7 Cow. 649-50. 238.; 8 Cow. 102. *Creditors*, interrogatories to examine them, Bla. ap. 103.; of creditors and witnesses, 2 Newl. 381.; interrog. by, before Master, Eq. Draft. 519.; competent wit. to will, 2 R. S. 57.; cross examination, see *ante* 7 Cow. 258. *Customs*, 2 Newl. 301. 302.304, 305. or usuage (see *Lex* Merc.) of trade what sufficient, how proved, 2 Cow. 712. 770.; of banks, 5 Cow. 153.

Date, 5 Cow. 480.; of agreement, 1 Johns D. 23.; deed, ib. 495; blank, 7 Cow. 336. *Death*. See as to mode of discovering death of persons on whose lives estates depend, *ante* vol 1. p. 168 and *post* ch 5. s. 53.; how proved or presumed, (2 R. S. 1 Johns. Dig. 280-2. 5 Cow. 314. 123. 2 Cow. 823. arg. Bla. 107-8. app.; of witnesses, 1 R. S. 761. See Sumscribing witnesses. *Debts due*, Eq. Draft. 508.; owing by testator, ib. 509. *Debtor and Creditor*, 1 Johns. Dig. 205. 248. *Declarations* (see Admissions, &c.) when or not admissible, 1 Johns. Dig. 588-590. 1 Wend. 185. 6 Cow. 225.; corporators, 1 Paige 601. 614. 610. 2 R. S. 405. 407.; trustee, 1 Wend. 625. partner, 9 Cow. 420.; vendor, 9 Cow. 30.; overruling a point in, 7 Cow. 752.; agent, 1 Wend. 185.; when inadmissible, 6 Cow. 178. 7 Cow. 256.; 1 Wend. 4 '4.; as to title or disclaimer, 6 Cow. 751.; testator or devisor as to will, 6 Cow. 178. See 4 Cow. 483.; grantee as to deed, 6 Cow. 617. 5 Cow. 485.; tenant, 5 Cow. 346. 4 Cow. 587.; ex parte declarations or impressions, 7 Cow. 256.; when admissible, vendor, 9 Cow. 30. 7 Cow. 752.; tenant, 4 Cow. 587. *Decrees, Judgments, Sentences, and Judicial Proceedings*: (see res judicata, lapse of time, foreign, order, record, 2 Wend. 64. 3 Wend. 27. 3 Cow. 120. 1 Paige 35. 4 Cow. 559.; of surrogates, 6 Cow. 316. 494. 5 Cow. 168. 299. 4 Cow. 667. 1 Johns. Dig. 224-5.; copies of, Bla. 107. app. *Deeds*: in evidence, proof of execution and delivery, (see acknowledgments, certificate, hand writing, sub. wit. bond, &c., witness how compelled to prove,) 1 R. S. 764-5. 759. 761. 1 Johns. Dig. 573-4. 216. 218. 495-7. 499. 7 Cow. 85. 5 Cow. 383. 1 Wend. 506. 478. 2 Wend. 308. 6 Cow. 617. 9 Cow. 13. 120. 94.; execution of, &c. Bla. app. 99. wit. dead, 2 Newl. 291; living, ib. 292.; instructions and circumstances of execution, ib. 296.; finding of old deeds, ib. 296.; consideration really paid, ib. 298.; receipts on deeds, ib. 293.; deeds lost, 6 Cow. 628.; presumed, 1 Johns. Dig. 230. See consideration, 7 Cow. 360. 6 Cow. 62. 90. 9 Cow. 69.; identity of grantor, (see Identity,) two deeds from same *name*, 9 Cow. 140. 1 Paige 270.; parol to explain, &c. 1 Paige 202. 9 Cow. 747. See parol. *Defective title* in vendor, Eq. Draft. 529. *Delivery*, see Deed; delivery, 1 Wend. 478. 6 Cow. 617. 2 Wend. 308. *Depositions*; (see Affidavits) caption of, &c. Hoff. 353. No. 25. 354. No. 26.; taken on proof of will, 2 R. S. 62.; taken in this state to be used elsewhere, ib. 396.; in *perpetuam rei memoriam*, ib. 399. *Description*, see boundaries, location, 1 Johns. Dig. 492.4. 7 Cow. 42.; parties, 9 Cow. 140. *Devisees*, (see heirs, executors,) 1 Johns. Dig. 220-3. 239. 524.; wit. to execution of will, 2 R. S. 65. *Diligent inquiry*: see Search, Inquiry. *Directory*, to prove identity, 9 Cow. 140.. *Dis-*

charges of insolvents, 2 R. S. 38. See Records. *Disclaimer*, 6 Cow. 617. 751. *Dissolution*, of copartnership, 2 Johns. Dig. 169, 170. *Divorce*, evidence in, 2 R. S. 145.; do. limited divorce, ib. 147.; to annul marriage, ib. 144. *Documentary* evidence of public nature, 1 Johns. Dig. 570-1.; private, as corporation books, ib. 571.

Enlarging time for performance by parol, 1 Johns. Dig. 32, 33. *Entries*: administration entries, Eq. Draft. 491.; in merchant's account book, 1 Wend. 119. *Erasures*, 1 Wend. 625. See interlineations. *Estate* in defendant's possession, Bla. app. 99. *Evidence*, as viewed in chancery, 1 Johns. Dig. 224-232. See written evidence, judgments, &c., judicial proceedings; private writings; oral, parol to explain, &c.; presumptive evidence; witnesses; testimony how taken; must be confined to the issue; see Issue. Evidence in particular cases; in fraudulent bankruptcy by monied corporations, 1 R. S. 592; of execution of conveyances, ib. 758. See wills, execution of, on bills to annul marriages, 2 R. S. 144. See divorce, judgmt. fraudulent, answer, parties, consideration, confessions, that official papers cannot be found, 2 R. S. 552. Evidence of the testimony of a deceased witness, 3 Wend. 251. *Execution* (See deeds, wills, bonds, subscribing witness, &c.) of a bond, Eq. Draft. 518-19.; when and how executed, and whether obligor was inintoxicated, &c. Eq. Draft. 552., or of sound mind, 2 Newl. 296. *Executors* of plaintiff's mother, or any other witness examined as to pedigree, Eq Draft. 488.; or as to possession, ib. 489.; or monies laid out, &c. by the testator who was a receiver, stewart, agent or manager of the estate in question, ib. 498.; or as to testator's personals, debts, stock, receipts and disdursements, Eq. Draft. 12, 13. 508-11. 520. 570. Hoff. 340-1. Newl. 379. 306-7. Executor, 1 Johns. Dig. 233. (see set-off, letters testamentary) acts and admissions when not evidence against heirs or devisees, 3 Cow. 611.; inventories, 2 R. S. 449. *Exemplifications* of records, &c. (see copies) 4 Cow. 71.; of deeds, conveyances, 1 R. S. 759. 760. 3 Wend. 180. 2 Wend. 592; wills, 2 R. S. 58, 59. 80.; records and papers made by clerks, 1 R. S. 377. 2 ib. 403.; records and proceedings in foreign countries, 2 R. S. 396.; and their written laws, 2 Wend 411. See foreign. Exemplified copy of copy, 4 Cow. 587. *Corporation* proved by *exemplification* and *user*, 1 Wend 555. See Corporation. *Exhibits*, proof of, Eq. Draft. 548. Coll. 80. *Ex parte* declarations or impressions inadmissible, see 7 Co. 256. *Expenses*, of family, &c. Eq. Draft. 559.; of living, tra- &c. ib. 559.; of a ship, ib. 560. *Extracts* (see copies) from doubtful documents inad. The original must be seen, 13 Price 500.

Fine, Eq. Draft. 529. *Finding* old deeds, surveys, &c. Eq. Draft. 566. *Foreigner*, Coll. 109. 131. 5 Cow. 314. *Fo-*

reign (see affidavits, records and proceedings, judgments, decrees, &c.) laws and legal proceedings of other states and countries, 2 R. S. 396-7. 1 Johns. Dig. 244-5. 571-3. 4 Cow. 520-5. n. (a) ; records, &c. 7 Cow. 434. 4 Cow. 292. 3 Wend. 267. 2 R S. 396-7. ; copy of a will, 1 Paige 13. ; sentence, 6 Cow. 404. 2 Cow. 56. ; judgments, decrees, &c. 3 Wend. 267. 4 Cow. 526 7. n. (a) ; statute laws, 2 Wend. 411. 4 Cow. 525. n. 526. n. ; municipal, 2 Wend. 64.. or common law, 4 Cow. 525. n. Code Napoleon, 3 Wend. 173. ; laws of other states must be proved, 1 Paige 220. ; see exemplification of, 2 Wend. 411. *Fraud* and *Fraudulent* (see judgment,) bankruptcy, 1 Johns. Dig. 112. 191. Eq. Draft. 533. 540. ; by monied corporations, presumptive evidence of, &c. 1 R. S. 592. See vol 3. of R. S. ; agreements and conveyances, 1 Johns Dig. 248-251. 175. 31. 206-8. 7 Cow. 360. ; certain conveyances presumed fraudulent, &c. 1 R. S. 728. 2 R. S. 134-137. Fraud presumed in equity, not at law, 8 Cow. 361. 4 Cow. 207. See 6 Cow. 673. *Freehold estates* of testator, Eq. Draft. 522. See 511. 507. 522. 524. 2 Newl. 308-7. *Freightage* of a ship, Eq. Draft. 560. *Funeral expenses*, Eq. Draft. 509.

Goods sold and delivered, Eq. Draft. 475. *Grand-father* : proof as to knowledge of him, Eq. Draft. 492. 529. *Grants* ; certain grants of title in state presumptive evidence, &c. 1 R. S. 283. 2 Johns. Dig. 173-5. 1 ib. 230-2. 491. ; presumed or not, 6 Cow. 706. 3 Wend. 149. 2 ib. 13, 14, 15. 357. 1 Johns. Dig. 230-2. Grantor wit. being no warranty, 1 Cow. 613. See credit, &c. *General reputation*, 1 Johns. Dig. 591. 5 Cow. 237. ; of decease, and of what country, 5 Cow. 314. ; not, as to officers of a corporation, 7 Cow. 234.

Hand writing, Eq. Draft. 480. 519. 523-4. 525. 528. 548. 568. ; 2 Newl. 291. 296. ; of party, 3 Wend. 102. ; of subscribing witness, 9 Cow. 140. ; 1 Turn. and Russ. 417. ; see will when or not admissible, 5 Cow. 237. 314. 123. 221. 383. 1 Johns D. 576-8. see comparison, subscribiug wit. *Hearsay*, see general reputation, 1 Johns Dig. 591. ; 5 Cow. 237. *Heirs* at law, see 7 Cow. 187. ; 3 Cow. 611. ; 1 Johns Dig. 254. 620. ; (see executors) 2 Newl. 299. ; exam. as to management and disbursement upon an estate over which his ancestor was stewart, receiver, agent, &c., Eq. Draft. 498. ; whether a man died without any, 5 Cow. 314. ; heirs and devisee, 1 Johns Dig. 239. ; 7 Cow. 71. *Honor* : person bound in honor to contribute to expenses of suit, competent wit., 1 Turn. and Russ. 366. *Husband and wife* ; (see marriage, &c.) 1 Johns Dig. 255, &c. ; 2 ib. 9. &c.

Identity, of the person or name, Eq. Draft. 570. ; Coll. 64. ;

3 Cow. 237.; 9 Cow. 94. 140.; 1 Paige 291. 270.; under a marriage settlement, Eq. Dr. 523.; see ib. 492-3.; see relationship, pedigree. *Idiots:* idiocy, 4 Cow. 207.; 1 Johns Dig. 305-8.; 2 ib. 125. *Illegitimacy*, 2 Newl. 312. *Impeachment* of witnesses, 1 Johns. Dig. 603.; 5 Cow. 314.; see witnesses, credibility, &c. when evidence in support of a wit. impeached, 5 Cow. 314.; and latitude in cross examining the impeaching wit. 7 Cow. 263.4 Wend. 232. *Inclosure*: interrog. respecting, Eq. Dr. 561. *Incompetancy* of wit. (see credit and competency interest, witness.) 1 Johns Dig. 228. 396. 591. 356.; from *conviction* of any species of crimen falsi, 9 Cowen 707.; see 8 Cowen 101.; 6 Cow. 254.; indictments not enough, 2 Wend. 555.; or from interest, or liability, gain or loss, see interest, 6 Cow. 484. *Incumbrances*: on a plantation sold and to whom due, Eq. Draft. 517. *Indorsements*, on a deed, Eq. Draft. 495. 566. 567. *Inquiry*, after witness, 2 Newl. 296. *Inscriptions* on tomb stones, Eq. Draft. 490. *Insolvent debtors*: (see discharges, records,) 6 Cow. 497. *Intention*: when explained (see parol) 1 Wend. 541. 85.; 1 Paige 202. 270. 291. *Insanity*; 4 Cow. 207.; Coll. 291. 314. *Instructions*, in drawing will, 2 Newl. 294-5.; 1 Paige 541; or deed, ib. 296. *Interrogatories*: title, beginning and conclusion, Eq. Draft. 475-6. 571.; Hoff. 340.; Bla. 232; Newl. 381. 291. 393-4.; words of course preceding the answer and exam. before the Master, after hearing, Eq. Draft. 12, 13.; no interrogatories can be filed, which do not arise from, or relate to some fact put in issue, 1 Cow. 711.; 3 Wend. 573. see issue. *Intestacy*: Bla. 105. ap. *Intestate's estate* and effects, Eq. Draft. 498. 503.; Coll. 39. 3. 6. 9. see testator, executors, estate. *Intoxication*: of party exchanging an instrument, Eq. Dr. 552. *Inventory*: Bla. 105. ap.; of executors, &c. 2 R. S. 449. *Issue*: 1 Johns Dig. 346.; proof confined to issue, 1 Cow. 711.; must be *secundum allegata*, 3 Wend. 573. *Interest*, when it excludes, 1 Johns Dig. 596-8. 396-8.; 1 Paige 18.; a purchaser knowing a third claim no wit. for vendor, 1 Paige 147.; widow of deceased partner *for* survivor not even if released, 9 Cow. 631.; co-partner not to prove title in another, 3 Wend. 240.; but see ib. 415.; 1 ib. 148.; or a person liable for costs, 7 Cow. 650.; but see *post.*; an interest to exclude a witness must be a direct interest in the *event* of the suit, not in the mere *question*, which goes to his credibility, and not to his competency, 1 Paige 18.; 6. Cow. 369.; 7 Cow. 266. 358.; *when it not* excludes, 5 Cow. 123.; 1 Johns Dig. 598-602.; see agents, ib. 602.; release, ib. 602-3.; co-debtors not sued (at law), 9 Cow. 44.; or co-obligors on joint and *several* bond in suit (at law) against one, 3 Wend. 380.; assignor wit. between

CHAP. II.

assignees contending for priority of mortgage assigned, 9 Cow. 316.; witness interested if called by the other party is made or becomes competent for him for whom he is interested, 2 Wend. 166. 483.; 7 Cow. 238.; or where his interest is against the party calling him, 7 Cow. 752.; 8 Cow. 669.; or is *neutralized* or *balanced* between the contending parties, as vendor or wife of vendor, 1 Wend. 109.; of personals liable to both on his warrantee of title, 3 Wend. 386.; or though liable to loss by the determination of the cause against the party calling him, he is yet competent if fully secured and indemnified against the loss, 7. Cow. 358.; *e. g.* the attorney (or solicitor) for a non-resident plff no security for costs being filed according to the rules of the court is if indemnified a competent wit. for plff. ib.; 7 Cow. 358.; or a partner of plffs. atty. though *interested* in the *costs* and as counsel expecting higher fees, is a wit. 1 Wend. 126.; or if released (see release) by a party for instance to whom he must contribute in the event of the suit terminating against him, 2 Wend. 527.; or if an insolvent has released all claim to surplus, he is competent for his assignees, 6 Cow. 497. *Interlineation*: made with different ink, and noted must be explained, 9 Cow. 125.

Judicial proceedings: 1 Johns Dig. 224-5. 571-3.; see decrees, &c. foreign, &c. judgments, sheriff's return, sheriff's certificate of sales, &c. will, depositions, on proof of; answers. *Judgments*: (see decrees, &c.) how far evidence, 2 Wend. 64.; 1 Johns Dig. 224. 566-9.; conclusive, ib. 224.; see ib. 571-3.; or when impeached or when inquired into, ib. 288-9.; if fraudulent, what evidence to set aside, 2 R. S. 174.; 1 Johns Dig. 640.; evidence as to judgments of *justice's*, (or inferior courts not of record) of other states, show the statute creating them, 3 Wend. 267. *Justice's* docket book, &c., 2 R. S. 269-271.

Knowledge of, or *acquaintance* with the *parties*, Bla. 99. ap.; or *persons*, ib. 105-6. see identity, parties, interrog.

Lapse and *length* of time *merely* raises no presumption, without facts, within the time, 5 Cow. 123.; as to title in tenant adverse to landlord. ib.; as to laches, length of time and possession, see 1 Johns Dig. 296; no presumption for intruder, 7 Cow. 187.; presumptive evidence from lapse &c., 1 Johns Dig. 230-2.; when a bar to an account in chancery, ib. 161-3. But see as to limitations, *ante* vol. 1. p. 97.; when evidence of payment of judgments and decrees foreign or domestic, or sealed instruments (20 years) and

how the presumption repelled, 2 R. 300-1.; as to will, 5 Cow. 221.; 9 Cow. 208. Grant; 6 Cow. 706.; or land contract sealed, 6 Cow. 401. *Latent ambiguity* (see ambiguity) 6 Cow. 333.; in will, 1 Wend. 541. *Laws of the state*, as published by the state printer, evidence, 1 R. S. 183-4.; 2 ib. 778.; see 'foreign' laws, 1 Johns Dig. 571-3. 244. *Lease* or agreement for, Eq. Draft. 565.; Coll. 178. 194.; leasehold property, Eq. Draft. 510.; when lease presumed, 1 Johns Dig. 230-2. see presumption. *Legacies*: 6 Cow. 333.; 8 Cow. 133.; 1 Johns Dig. 298. 236.; 2 ib. 113.; tender of, 2 Newl. 299. 300.; application for, Bla. 133.; or to pay, Coll. 193. *Legatee* wit. to will, 2 R. S. 65.; residuary legatee, no wit. for personal representative, 7 Cow. 64. *Legal effect*; not controled or explained by parol, 9 Cow. 749. *Letters*: Eq. Draft. 480. 520. 556. 557. 563. 2 Newl. 292.; copy in letter book, ib. 299. 300.; 6 Cow. 90. *Letters testamentary* of *administration*, and appointing, *collector*, conclusive evidence of authority, 2 R. S. 80. *Length of time* and possession, see lapse, &c. *Lex mercatoria*: how proved, 2 Cow. 713.; argo. see custom, usage, foreign laws. *Limitation*: (see lapse and length of time) and *ante* vol. 1. p. 69.; 1 Johns Dig. 162. 301.; 2 ib. 120. *Limited partnership*: (see partnership) 1 R S. 763.; 2 Johns Dig. 167. *Living or not*: one who went abroad, Coll. 133. 143. 144.; see abroad, death. *Locality, location*: how proved, &c. of patents, grants, &c. (see boundaries) 7 Cow. 723. 761.; 9 Cow. 125.; 6 Cow. 369.; 2 Johns Dig, 175-3. *Loss* and *lost, or distroyed*: next best evidence, 2 Cow. 537.; 6 Cow. 404. 628.; 7 Cow. 334. 645.; 9 Cow. 208. 125. 4 Cow. 483.; 3 Cow. 303. 1 Johns Dig. 141-2. 2 R. S. 406. see certificate of seauch, &c. *Lunatics*: estate, inquiry into, Eq. Draft. 505. *Lunaticy*: Coll. 129. 250.; 4 Cow. 207.; 1 Johns Dig. 305-8. 2 ib. 125.

Management of estate, Eq. Draft. 498. (see estate) Eq. Draft. 498. 503. *Manner of living*, Eq. Draft. 559. *Manor custom*, 2 Newl. 304-5.; boundaries between, Coll. 100. *Map*, of a patent, 5 Cow. 346.; copied from original surveys, burnt, 9 Cow. 125.; of canal. See office copies certified. *Marriage*, certificate and entry of, 2 R. S. 141. But see Laws, sess. 53.; mode of certifying, ib. 403.; evidence on bills to annul, 2 R. S. 144.; proof from registry, Bla. 106. app. Marriage, Eq. Draft. 493. (how proved, 5 Cow. 237.) 1 Johns. Dig. 255-6. 2 ib. 9, 10.; marriage settlement, 1 Johns. Dig. 256-7. and proof of identity, Eq. Draft. 523. *Master's deed*, 8 Cow. 543. *Memorandum* of notary, when presumptive evidence, 2 R. S. 284. 2 Wend. 513. 369.; or of an agent deceased, 1 Paige 13.; on sales at auction, Eq.

Draft. 528.; within statute of frauds, 1 Johns. Dig. 175. 248. 2 ib 343. 7 Cow. 92. *Mercantile usage*, 6 Cow. 266.; terms, 7 Cow. 202. *Mistake*, not shown by parol, but corrected on bill filed, when the evidence must be clear and satisfactory, 1 Paige 278. 9 Cow. 747. 1 Wend. 541. *Monied corporations*, see Fraud; money lent on securities, Bla. app. 101.; or lent and advanced, Eq. Draft. 569. 475. 553.; had and received, Eq. Draft. 522-3. 558-9.; paid, ib. 553. 565.; or mortgage money or bond debts paid off, 2 Newl. 297.; or that consideration money in a deed was really paid, ib.; paid, laid out and expended, Eq. Draft. 498. 503.; in managing an estate, &c. ib.; money tendered, ib. 569. *Mortgaged property*: Examination of mortgagee as to rents, profits, disbursements, &c. Eq. Draft. 512. 516. 2 Newl. 383.; as to crop, incumbrances, and the security mortgagee had besides his bond and mortgage, Eq. Draft. 517.; mortgage debt, proof of amount of, &c. ib. 568.; or payment of, 2 Newl. 297. As to mortgage, (1 Johns. Dig. 308 2 ib. 136.); account between mortgagor and mortgagee, 1 ib. 323.; mortgage always a mortgage, no proof contrary, 2 Cow. 3. 4.; mortgagor when not a witness (at law) 7 Cow. 360. *Motions*: how persons refusing affidavits, compelled to testify on, 2 R. S. 554. See ante p. 45.

Name, Coll. 67. 64. 51.; see identity, 5 Cow. 237. 314. 9 Cow. 140. 1 Paige 291. 270. *Next of kin*, 2 Newl. 299. Coll. 3, &c. *Notarial* protests, notes, &c. (see memorandum) 2 R. S. 283-4. *Note* of hand, Eq. Draft. 569. See Memorandum. *Notices*, (see affidavit,) contents, copy, &c. and proof of delivery, Eq. Draft. 525 564. 567. 2. Newl. 296. that another Solicitor would be employed, Eq. Draft. 557. to produce papers (at law) 7 Cow. 234-5. See 1 Johns. Dig. 581-2.

Oaths, 2 R. S. 407-8.; 2 Johns Dig. 154.; *ante* p. 33. *Occupiers* of lands, 2 Newl. 302. *Offer* of money (see tender) Eq. Draft. 480. *Office* and *office*, 2 Johns. Dig. 154-6.; what situation he held, his expenses, resourses, and what received, &c. Eq. Draft. 558. *Office copies certified*, by secretary of state, 1 R. S. 166. 720.; accounts by comptroller, ib. 174.; by comptroller or surveyor general, ib. 187.; of canal maps, ib. 218.; by town clerk, ib. 350.; county clerk, ib. 377.; certificate of marriage, 2 R. S. 141.; mode of certifying, and when to be attested by seal, 2 R. S. 403-4. *Official papers* not found, 2 R. S. 552. *Oral*, see parol or oral testimony. *Order* in chancery, 8 Cow. 333. 623.; 1 Johns. Dig. 351-2. see decrees. *Opinion* of wit. 4 Cow. 355. *Ownership*: presumptive evidence of, 1 Johns Dig. 230-2.

Parol evidence, or oral testimony, (see witnesses, confidential communications, corporators creditor, parties, devisee, commission, legatee, &c.) what may be proved by parol, 1 Johns Dig. 584-591.; 7 Cow. 334.; and as to statutes of frauds, 1 Johns Dig. 175. 248. 645.; parol evidence to explain, vary, contradict, written instruments, when or not admissible, 1 Johns Dig. 226-8. 578-581.; 7 Cow. 322.; 2 Cow. 537. 522.; 9 Cow. 39. 747.; 1 Cow. 249.; 1 Wend. 424.; 7 Cow. 322.; 9 Cow. 140. 747.; as to policy 2 Johns Dig. 44-45.; 1 Wend. 85.; 1 Paige 278.; 7 Cow. 202.; 9 Cow. 747.; 1 Paige 202.; mortgage, 2 Cow. 324.; 8 Cow. 543.; misrecital in mortgage or in bond, 7 Cow. 13.; as to award, 7 Cow. 290.; or arbitration, ib.; intent, 1 Paige 270. 291.; 5 Cow. 509.; 8 Cow. 246.; 9 Cow. 747. 140.; 1 Wend. 541. 85.; consideration, 5 Cow. 173. 144.; 9 Cow. 69. 266.; 1 Cow. 249.; 7 Cow. 322.; legal presumption, 1 Wend. 424.; or legal effect, 9 Cow. 747-9.; non-delivery, 1 Wend. 478.; deed, 9 Cow. 69. 140. 747.; 1 Wend. 478.; 9 Cow. 266. 140. 747.; 1 Paige 278. 222.; resulting trust, 2 Wend. 465.; master's deed, 8 Cow. 543.; misrecitals, variances, 9 Cow. 128.; 7 Cow. 509.; sale, 1 Wend. 424.; 7 Cow. 334.; reservation on a sale, 6 Cow. 751.; 1 Wend. 424.; 9 Cow. 39.; or upon a deed, 9 Cow. 747., defeasance, 1 Cow. 249.; 2 Cow. 324., 7 Cow. 322.; subsequent agreement, 1 Cow. 249.; 7 Cow. 322.; performance, ib.; warranty, 1 Wend. 424.; receipt, 1 Paige 13.; 7 Cow. 334.; 6 Cow. 360.; mercantile usage or meaning as to words or terms, 6 Cow. 265.; 7 Cow. 202.; will, 8 Cow. 246.; 1 Paige 270. 291.; 1 Wend. 541.; legacy, devise, ib.; identity, 9 Cow. 140.; 1 Wend. 85.; 1 Paige 270. 291.; 9 Cow. 140.; mistake, 1 Paige 278.; 9 Cow. 747.; 1 Wend. 541.; title, disclaimer, 6 Cow. 751. *Particulars* of sale at auction, Eq. Draft. 532. *Partition*: 9 Cow. 674.; see *post* ch. 5. s. 29., &c. *Parties*; see 2 Newl. 379-384.; interrog. for examination of complainant, Bla. 105. ap.; of complainant, mortgagee in possession, 2 Newl. 384.; of defendant, Hoff. 340. No. 8. or partner vs. partner, Bla. 232. (see partners) *pro interesse suo*, Eq. Draft. 571.; 2 Newl. 382-3.; or as a witness, Eq. Draft. 490. 554.; examination of executors, parties defendant after a hearing, Eq. Draft. 508.; see ib. 12. 13.; see executors, creditors; see further, 1 Paige 247. 404. 648. 122. (see executors, creditors, mortgagee, answer, interrogatories, as to knowledge of, or acquaintance with parties, Eq. Draft. 475. 558; answer to interrogatories of one defendant *possibly* liable for costs, not admissible for others, on ground of interest in event; the decree may be modified as to costs, so as to protect him from liability, and then he ma

be a witness, 13 Price 500.; see 2 Ves. 219.; 3 Atk. 401.; Ball. and Beat. 99.; Bellew v. Russel. But the possible liability for costs has been held not to exclude, 2 Cowen 139.; as to parties in interest or on record at law, not being compelled to testify, and exceptions to the rule, see 7 Cow. 174. 59. 69.; 5 Cow. 28. 74. 123. 153. 176.; 1 Wend. 119.; 2 R. S. 406. 288-9. 268.; party's own statement inadmissible, 7 Cow. 456. *Partnership*: see accounts, balance, books, advertisement, affidavit, agreement for, articles of, limited partnerships, certificates and affidavits in cases of, 1 R. S. 764-5.; evidence of existence of partnership, 2 Johns Dig. 166 7. *Interrog.* to prove it, Eq. Draft. 541.; as to partnership accounts, ib. 548. Do. by one partner against his co-partner, Bla. 232.; see farther as to co-partnership and partners as parties, or witnesses, Eq. Draft. 481-2. 544-8. 550. 503. 569. 535.; 1 Wend. 148.; 9 Cow. 631. 420.; 7 Cow. 650.; 3 Wend. 240. 415.; 2 Johns Dig. 164.; 1 ib. 329. *Passage* and *passenger*, price of, payment, particulars about passage, Eq. Dr. 553-4. 562. *Patent* 2 Johns Dig. 173. (see grant, deed, from the state, 6 Cow. 281.; 5 Cow. 458.) *Payment*, (see lapse, &c.) presumed (see presumptive evidence) 1 Johns Dig. 230-2. 316.; of annuities, Eq. Draft. 565., of money, see money paid, &c. 2 Newl. 301-3.; of accounts, 2 Newl. 310-11.; of land, contract presumed or not, 6 Cowen, 401. *Pedigree*, of plaintiff, Eq. Draft. 486-7. 491. 492.; Coll 112. 114. 199. how proved, 5 Cow. 237. *Performance*: time of enlarged or waived by parol, 1 Johns Dig. 32-3. 409-12.; of contract to convey, 5 Cow. 74. *Person*; identity, Eq. Draft. 523. 570.; 5 Cow. 287.; in will, 1 Johns. Dig. 510 (see identity.) *Personal estate* and effects, see estate, testator, executor. *Possession*, Eq. Dr. 499. 490. 570.; 9 Cow. 13. 1 Johns Dig. 296-7.; 2 ib. 417. see lapse, &c. *Power of attorney*, 5 Cow. 383. *Prescription*, 2 Johns Dig. 309. *Preservation of written evidence*; affidavits of publishing notices of sale of real estate, 2 R. S. 403.; private papers, ib. 404.; wills, ib 404-5.; certificate of search for papers, ib. 552. *Presumptive evidence*; see grants, lease, will, title, property, fraud, absence, death, notarial, memorandums, lapse of time, certificate, affidavit, sale, conveyances, payment, see also as to those heads of presumptive evidence, 1 Johns Dig. 230-2. 582-4.; 1 Cow. 251.; 2 Wend. 13. 14. 15. 357.; 3 Wend. 149.; of conveyance, trustee to cestui que trust, 4 Cow. 587.; re-conveyance, 3 Wend. 149.; 9 Cow. 69.; release where old lease found, 7 Cow. 431.; assignment of lease, 9 Cow. 88.; as to will, 9 Cow. 208.; title, 4 Cow. 587.; from possession, 9 Cow. 233.; lapse, &c.; 1 Johns Dig. 230-2.;

intruder, 7 Cow. 187.; mill privilege, 7 Cow. 266.; debt to incorporated company, 2 Cow 664.; of payment, ib. &c. 2 Wend. 13-15. 357.; 1 Johns Dig. 280-2. 582-4.; of fraud in equity, not at law, 8 Cow. 361.; presumptions how repelled or rebutted.; 1 Paige 477.; 6 Cow. 401.; 9 Cow. 88. 283.; 4 Cow. 587. see resulting trust. *Price of stock*: 2 Newl. 306.; whether adequate, Coll. 257. *Principal and agent*, 1 Johns Dig. 370-1. *Printer's* foreman's, &c. affidavit, see affidavits. *Private instruments*, (see deeds, certificates, and affidavits, wills, records, transcript, inventories, &c preservation of, &c.) or writings, 1 Johns Dig 225-6. 575. *Privileges* of witnesses from arrest, &c. 2 R. S. 402. *Probate*, of wills of personals, conclusive evidence, until reversed, &c 2 R S. 61; see 1 Paige 13. *Pro interesse suo*, see parties. *Promissory note*, Eq Draft 569. proof, see evidence; public documents and records: see comptroller, secretary of state, treasurer, laws published, revised statutes, journals of legislature, records, affidavits. *Purchase—Purchaser*, (see sale, vendee—vendor,) with full knowledge, 1 Paige 147. *Purchase money*, when paid, Coll. 86. see consideration, money paid.

Quantity or number of acres and boundaries; see Eq. Draft. 562. 522. 524. 507. 532. 433.; Coll. 100., see boundaries. *Quo warranto* against corporation, conclusive evidence, 8 Cow. 709.

Receipt, 2 Newl. 292.; 7 Cow 334; of treasurer, 1 R. S. 170.; signed by auctioneer, Eq. Draft 528.; endorsed on deed, &c. Eq. Draft 566-7.; 2 Newl. 292. *Recital* in deed, bond, devise, &c., 1 Johns Dig 511.; when evidence, 9 Cow. 86. 128.; estoppel, 8 Cow. 543. 253.; in foreign record, 7 Cow. 434; when not, 7 Cow. 88 128.; misrecital, 9 Cow. 182. see misrecital. *Receivership*, see Eq. Draft. 498. 504. *Records* in evidence, 1 Paige 35; 5 Cow. 262.; 3 Wend. 27.; 1 Johns Dig. 566-9. (see decrees, &c.) copies of. Bla. 107. ap. *Records and transcripts*, 2 R S. 58 80.; do. of conveyances, 1 ib. 759. 760.; insolvent's discharges, &c. 2 R. S. 38.; papers exemplified by clerks, &c. 2 R. S. 377.; 2 R. S. 403.; proceedings of foreign or sister state courts, &c. 2 R S. 396.; 2 R. S. 397.; 7 Cow. 435. (see decrees, &c.) *Register and registry*, of deeds, 1 Johns Dig. 499. 500.; mortgages, ib. 310-13.; 2 ib. 138-9.; deceased notary, 6 Cow. 162, (see notary,) births, burials, baptism Eq. Draft. 490. 523. 568. Bla. 106. ap.; copies or extracts, Eq. Draft. 564. 568. These registers prove pedigree, and if of a public nature (as those of the New-York reformed Dutch Church) a sworn copy is admissible, 5 Cow. 237. *Re-*

CHAP. II.

lationship: Eq. Draft. 498. 504.; Coll. 3. (see pedigree) *Release of interest*: 9 Cow. 128.; when or not available, 1 Johns Dig. 602-3.; morgagor to prove another mortgage paid, 1 Paige 18; widow of grantor, 4 Cow. 427.; one liable to contribute, &c. 2 Wend. 527 9 Cow. 128.; when *insufficient*, 9 Cow. 631., 3 Wend. 240. *Rents, issues*, &c. Eq. Draft. 498. 504. 511. 512. 516. 517. 522.; of West India estates, Eq. Draft. 512. *Repairs*, Coll. 43. 26. 304. *Reputation*, see general, &c. corporate officers not proved by, 7 Cow. 234. *Res judicata*, 4 Cow. 559.; 3 Cow. 120.; 1 Cow. 481. 501.; 1 Johns Dig. 224. (see decrees, &c.) Revised statutes, 2 R. S. 778.

Sales: by com's. of forfeitures, 6 Cow. 751.; sales, 1 Johns Dig. 113.; 2 ib. 341.; of estate at auction, Eq. Draft. 483. 527.; bought by agent, ib. 483.; of a ship, ib. 560.; of an estate, ib. 526. 529.; title, ib. 529. 532., what passed, ib. 526.; what crop then on ground, ib 517. *Sanity*, Coll. 14. 140.; 4 Cow. 207. *Sealed instruments*, see 2 R. S. 406. *Seal*, 2 R. S. 403. *Seaman*, dying intestate, Bla. 105. ap. *Searches*: 5 Coll. 383; 6 Cow. 404. 608.; 7 Cow. 334.; 9 Cow. 208.; for wills, &c. Eq. Draft. 491.; 6 Cow. 377.; 4 Cow. 483.; 9 Cow. 208.; entries of admn. Eq. Draft. 491.; what sufficient search and certificate, 2 R. S. 552.; 7 Cow. 334. (see certificate.) *Senate journals*, evidence, 7 Cow. 613. *Secondary evidence*, not, when that of a higher order is within reach, 1 Wend. 406.; preliminary steps or proof to, 9 Cow. 208.; 6 Cow. 628.; 7 Cow. 739.; 5 Cow. 123.; 4 Cow. 483.; (see loss, search, parol, handwriting.) *Secretary of state*, 1 R. S. 720.; see office, &c. *Separation*, 2 Newl. 312.; 5 Cow. 237. *Set off*, against exrs. and admins. when evidence, 2 R. S. 355.; see 1 Johns Dig. 376. 163-6. 391. *Sheriff's returns*, 6 Cow. 465. do. 1 R. S. 173.; sales see certificate. *Ship*, sale, freightage, expenses, &c. Eq. Draft. 560. *Seisin*, 5 Cow. 299.; possession, evidence, 9 Cow. 13. *Situation, office*, resources, expenses of incumbent, Eq. Draft. 558. *Slandering a witness*, 5 Cow. 503. 513. *Solvency*, &c. at time of assigning, Eq. Draft. 540.; see ib. 540. *Solicitors*, (see agency, &c.) 1 Johns Dig. 368.; examined respecting purchase, Eq. Draft. 481. 532.; 2 Newl. 306-7.; furnished purchaser with an abstract of title, Eq. Draft. 532.; as to authority for appearing at the hearing, &c. Eq. Draft. 356-8. *State* laws, (see laws,) 1 Johns Dig. 571.; sister states (see foreign) grants, (see grants, patents.) *State officers*, how far their acts evidence agt. the state, 4 Cow. 587. (see office copies certified.) *Stockholder*, see 6 Cow. 770.; *Statutory intendment*, authority, &c. 7 Cow. 88. 681. *Subscribing witnesses*, 5 Cow. 216. 383.; 4 Cow. 433.; 1 Johns.

Dig. 576-8.; sealed instruments proved by wit. who signed *at the time*, confession inadmissible, 2 Wend. 576.; otherwise as to unsealed, 2 J. 451. 16 J. 201. What sufficient inquiry to admit proof of his handwriting. That of one of several, all dead, proves the deed, 9 Cow. 148. (see hand writing,) see further, 1 Johns Dig. 576-8.; when witnesses dead, proof of deeds, 1 R. S. 761.; as to will, when some are living in the state, 1 Wend. 406. *Subscribing witnesses*, Eq. Draft. 480. 495-6. 556.; 2 Newl. 291-2-3. *Survey*, Eq. Draft. 561. 566.; 9 Cow. 125. *Surveyor*, a witness, Eq. Draft. 532. 433.

Tender; and refusal, Eq. Draft. 569. 480.; Coll. 47.; legacies, 2 Newl. 299. 300.; lease, Coll. 179; conveyance, 7 Cow. 53. *Testator and his relations*, identity, &c. and account of his estate and effects, Eq. Draft. 492. 503, 508-11. 520. 22. 570. 498.; 2 Newl. 306-7.; Hoff. 340-1. *Testimony*, how taken, 1 Johns Dig. 356. see witness; of a deceased witness, 3 Wend. 251.; or what one swore on a former trial, 6 Cow. 162.; to perpetuate, see affidavits, 1 Paige 601. *Title*, and proof of, 1 Johns Dig, 230-2. (at law) ib. 524. 531. 537. 2 ib. 401. 9 Cow. 233. 263. 661. 664. 182. 154. (see presumption) on bill to redeem, &c. Eq. Dr. 487.; interrog. thereon, ib. 488.; defective title in vendor, plaintiff's title, conversation respecting title, ib. 529.; objections as to title on sale, &c. ib. 532-3.; title deeds, ib. 507.; tax. title, 7 Cow. 88. *Tradition*. 5 Cow. 237. *Transcripts*, 2 R. S. 58. 80. see records, copies. *Transfer of stock*, 2 Newl. 304-5.; 7 Cow. 24. 402. *Translations* in evidence, 1 Johns Dig. 578. *Treasurer's receipt*, countersigned, 1 R. S. 170. *Trust and trustee*, (see ex'rs. account, testator, presumption, declarations, resulting trust) 1 Wend. 625.; 1 Johns Dig. 208. 384-395.

Understanding, Coll. 295.; weakness of, &c. 4 Cow. 207.; undue advantage, 1 Johns Dig. 30. *Usage*, mercantile, 6 Cow. 266.; 7 Cow. 202.; of trade, 2 Cow. 712.; 2 Johns Dig. 431. *Usury*, 7 Cow. 13. 717.; 9 Cow. 233.; 1 Johns Dig. 284. 2 ib. 87.

Value, of land, Eq. Draft. 532. *Valuable consideration*, or not, Eq. Draft. 529. see consideration. *Variances and mistakes*, disregarded unless they mislead, 2 R. S. 406-7.; 7 Cow. 13.; see (at law) 2 Johns Dig. 209. 194.; 7 Cow. 483. 517. *Vendor*, examined, 3 Wend. 386.; in respect to sale, crops, incumbrances, &c. Eq. Draft. 517. see sale, defective title in vendor, ib. 529.; see declarations, admis-

CHAP. II.

sions of vendor, 7 Cow. 752.; vendor and purchaser, 1 Johns Dig. 396-9.; 2 ib. 341.; 1 Paige 147. see purchaser. *Voire dire*, 3 Cow. 252.; 6 Cow. 27. see witness, interest. *Voluutary* deed, 1 Johns Dig. 219.; settlement, ib. 256. *Voyage*, Col. 212. (see Captain,) 2 Johns. Dig. 36,

Waiver, 1 Johns Dig. 32. 33. 411-13. *Warranty*, 9 Cow. 154.; 3 Wend. 386.; 2 Johns Dig. 346-9. see title. *Wills*, 2 R. S. 58. 80. 404-5.; of land, 2 R. S. 57-59.; of personal estate, 2 R. S. 61.; two witnesses only to either, 2 R. S. 63.; creditor, devisee, legatee, witnesses, 2 R. S. 57. 65.; see 'witness' how compelled, depositions taken on proof of, 2 R. S. 62.; will abroad and how proved, see laws, sess. 53. Apl. 20. 1830. 1 Paige 13.; see petition, &c. for commission in that case, *post* ch. 5.; proof of will and witnesses thereto, Eq. Dr. 494. 566.; 2 Newl. 293-4.: Blake 133; 2 Wend. 297.; probate of personal, proves, execution, 1 Page 13.; decree of surrogate evidence of will, and that defendant was executor, 6 Cow. 494. By *all* the subscribing witnesses if living, Eq. Draft. 496.; but see 1 Wend. 406.; 6 Cow. 178.; 4 Cow. 483.; or their handwriting and that of testator, 5 Cow. 221.; by copy, 2 Newl. 293.; see further as to proof and the witnesses, 2 Johns Dig 437-9.; 1 ib. 574-5. 399. 401. 506.; what sufficient proof of handwriting of attesting witnesses to will to ground a decree declaring the will to be well proved (or for establishing a will) James v. Parnell, 1 Turn. and Russ. 417.; search for will, Eq. Draft. 491.; as to search and loss, see 9 Cow. 208.; 4 Cow. 483.; see search, loss, lapse, presumption, exemplification, copy. *Witnesses*: Attendance, how procured and compelled, (see *post* § 48 vol 1. p. 44.) 2 R. S. 221. 276. 400-2. 535. &c. 559.; to prove a deed, 1 ib. 759.; will, 2 ib 57, 58.; de bene esse exam. or to perpetuate, or on commission from other states, 2 ib. 393. 397-9; on motions (S. C.) ib. 554.; reference, &c. ib. 384. 541. *Privileges*, (see privilege) 3 Cow. 381. 2 R. S. 402. 405, 406. 408. 1 Paige 601. 6 Cow. 174. 254.; as to swearing, examining, cross-examining, impeaching, &c. see *post* § 47. *Competency and credit* (see credit, &c.) 4 Wend. 232. 1 Johns. Dig. 603. *Competency* or *incompetency* (see Competency, Incompetency, Credit, &c.) See 1 Johns. Dig. 228-30. 591-5. as to religious belief or disbelief, 2 R. S. 408. 2 Cow. 431. 572.; ministers, physicians, &c. see confidential communications; crimes, offences, convictions, or sentences, 2 R. S. 681. 701. 2 Wend. 565. 8 Cow. 102. 9 Cow 707. 6 Cow. 27. 254. *Interest*: 1 J. Dig. 598, &c. 396. (see interest); gain or loss, 6 Cow. 27. 248.; 7 ib. 353. 752.; 8 ib. 669. 223.; as to title and possession, warrantor, &c. (vendor, agent, purchaser) 6 Cow. 248. 8 Cow. 290, 3 Wend, 386.; 1 Paige 147, 7 Cow. 266

238.; in costs, 2 Cow. 139. 13 Price 500. *Written evidence*: see public documents and records, exemplification of records, &c; office copies certified, judicial proceedings, deeds and other private instruments, preservation of written evidence, interlineation, &c 1 Johns. Dig. 224-8 566, &c. 645, &c. 1 Wend. 625. *Writings*, to prove them in the words they contain, or by copy, Eq. Draft. 566. See as to writings, bond, deed, hand writing— subscribing witness.

Examinations and Testimony.

§ 47. Vol. I. p 44. examinations and testimony. *Summons* that defendant bring in his examination, see form Blake 238. *Affidavit* of service *ante* § 40. *Master's certificate* of default, Hoff. 342. No. 9. Do. of not attending to be *orally* examined, Hoff. 346. No. 13. Orders; 1. Order nisi *post* No. 1. See also forms

The interrogatories being settled and served, the answer and examination of the accounting party is the next step. The new orders authorise the Master to take down the examinations or evidence on written or oral interrogatories of any witness, creditor, claimants coming in, or party. But in case of an *accounting* party [§ 50.] any other party not satisfied with the accounts brought in, *may examine him upon interrogatories, as the Master may direct.* The course of proceedings(*a*) may be this: 1. A summons underwritten 'at which time the defendants (the executors) are required to bring in their examination;' or in other cases 'that the (party, creditor, &c.) is required to attend and be orally examined:' 2. An affidavit of service. [p. 96.] 3. The Master's certificate of defendant's default, in not bringing in his examination, or not attending to be examined orally. 4. Compulsory steps: the compelling process may be by order to show cause, or for at-

Hoff. p. 27. Eq. Draft. 503. 2. Order absolute for attachment, *post*, No. 2. *Attachment*, see rules of court ap. p. 84. No. 2. *Interrogatories* for examining on contempt and answers thereto, &c. See 2 R. S. 537. § 19. and analogous form in Blake 106-7. appx. Order for commitment, &c. see 2 R. S. ib. Order for discharge on condition of paying costs, and putting in—*Examination*: viz. of defendants, executors or accounting parties, form *post* No. 3. *or* of other defendants or parties form *post*, No. 4. *See* words of course preceding the answer and examination of defendant an executor, &c. Eq. Draft. 12-15. *Other forms* of examinations, Bla. 238. Hoff. 342. No. 10. Examination of mortgagee in possession as to rents, profits, crops, incumbrances and other sources of payment and security, beside his bond and mortgage. Eq. Draft. 512. 516. 517. Form of *oral examination* of party, Hoff. 346. *Do. objecting to answer*, ib. 347. Form of *further examination, objecting* to answer a certain interrogatory, ib. 344. No. 12. *Oath* on *oral* exam. ib. see 2 R. S. 407. *jurat* to answer and examination, Hoff. 343 No. 11. same as to other answers, &c. *ante* § 8. p. 35. *certificate of insufficiency* of oral examination, Hoff. 347. see *post* § 49.

(*a*) See Hoff. 26-8. Bla. 235-6.

CHAP. II.

tachment.(b) If the summons for a party to bring in his examination or attend, pursuant to a prior order for that purpose, was served on the Solicitor, then an *ex parte* order nisi [see § 12.] in the alternative, to bring in, &c. or show why attachment should not issue, as in case of production of books, &c. [p. 152.] may be obtained on special application by motion or petition to the Chancellor or a Vice Chancellor having jurisdiction of the cause, founded on the Master's certificate. On service of such order, and on affidavit thereof, and on the further affidavit, or certificate of the Master, of the neglect of the party, an order absolute for attachment may be applied for. But personal service of the orders if practicable should be made to ground process of contempt, and the party has right by statute.(c) to service of all papers on which the application is made, and is entitled to be heard in defence. If, however, the service of the summons had been personal, and not merely on the Solicitor, then as the non-attendance or neglect to bring in the examination pursuant to such summons was a violation of the original order of court under which such proceedings took place, the application, it seems, may be for an order absolute, but usually in the alternative, that the party attend forthwith, or that an attachment issue, as in forms, *post*. 5. The attachment being delivered to the sheriff and served, the party is bailed or kept in close custody, and brought up on the return day when, 6: Interrogatories are filed specifying the facts and circumstances alleged against the defendant, requiring an answer thereto; upon which the written answers of the defendant under oath are taken (upon a reference to a Master for this purpose) proof contradictory or in confirmation received, and upon the original affidavits and such counter or supplemental proof, the party may be discharged or committed as directed by the statute.(d) 7. The order and process for commitment must specify the act or duty to be performed, and amount of the fine, and expenses to be paid, and the party thereby stands committed till

(b) 2 R. S. 536. p. 204.
(c) 2 R. S. 534-6. &c. *ante* vol. 1. (d) 2 R. S. 537-8 § 19.

he comply with such act or duty;(e) whenever he is willing to put in his examination, he may: 8. by petition apply to discharge the order, and be released from custody; a conditional order for his discharge will be granted to take effect upon his paying all costs, and putting in the examination

No. 1. *Ex Parte, order Nisi, &c. that Party (bring in Examination or Produce Books, &c.) or, show Cause why an Attachment should not issue.*

[Caption, title, and commencement, § 32. p. 78.] On reading and filing an affidavit of ——, the Solicitor for the complainant in this cause, and a certificate of ——, esq. one of the Masters of this court, from which it appears that the defendants in the said cause have been duly summoned (to bring into the office of the said Master their answer and examination to the interrogatories of the said complainant, filed with said master, *or* to attend and be examined *viva voce* before said Master to the interrogatories of the complainant, &c. *or* to produce before the said Master, *or* exhibit to the complainants for inspection, at such time and place as may be directed by the order of said Master, all books of accounts of the factory mentioned in the pleadings in the said cause, and all accounts in the possession of the defendant W. H. or either of the defendants, rendered by J. H. and the accounts of all other agents or sub-agents employed by him W. H. or by the said factory, and all other books, vouchers, papers and documents relative to the subject of the said reference in the possession or control of the said defendants, or either of them, relating to the accounts directed to be taken by the decree in the said cause,) on a day now past, but that the said defendants have not (put in their examination, *or* attended to be orally, &c. *or* produced before the said Master, such books, papers, accounts, or writings, or any of them.) And on motion of the said ——, of counsel for the said complainant, it is ordered that the said defendants do (bring in their examination, &c. *or* produce the books, vouchers, papers and documents) aforesaid before the said Master within —— days, and do also pay the costs

(e) 2 R. S. 538.

CHAP. II.

of this motion to the complainant's Solicitor, or in default of such production and payment, do show cause before this court on the —— day of —— instant at the —— in the city of ——, at the opening of the court on that day, or as soon thereafter as counsel can be heard, why process of contempt should not be issued against them.(*d*) This order must be served personally if practicable, and if not, a clause should be added to the effect 'that service of this order on the Solicitor of the party be deemed good service.' [See service of orders and affidavits, § 32.] On affidavit of service, and of the non-compliance with said order (or a certificate to this effect from the Master,) move the court for an order for attachment. On granting the order the court will direct the amount of the penalty of the bond to be taken by the sheriff for the appearance of the defendant on the return day to answer. In such case a certificate is endorsed by the register, &c. that the attachment issues 'by the special order of the court, bailable in the sum of ——.(*a*) The sheriff on receiving a bond in such penalty will discharge the defendant, and return, and file the bond with the writ. If the party do not appear, another attachment may be awarded, or the bond ordered to be prosecuted, *or* both as directed by statute.(*b*) If the party be finally brought up, proceed by interrogatories as already suggested. The final order and process for commitment must specify the amount of the costs(*c*) which of course must be ascertained on taxation, by a Vice Chancellor or taxing Master; [§ 82.] not as formerly, by the Master to whom the examination for contempt, was referred. But the necessity of an order to show cause may be obviated, (where the party has, on being summoned, neglected to attend) by a special motion for attachment founded on personal service of notice thereof, and of the documents in support of the motion. The following is an alternative order absolute for attachment founded on personal service.

No. 2. *Alternative Order Absolute for Attachment.*

[Caption, title, and other commencement of orders,

(*d*) See 2 R. S. 536. § 5.
(*a*) 2 R. S. 536-7. See rules of court p. 84.5. attachment No. 2.
(*b*) Ib. 539. see *ante* vol. 1. p. 204. 227.
(*c*) 2 R. S. 538. § 23. 24.

§ 32. p. 78.] The papers in this cause having been submitted to the court by counsel of the respective parties on a motion in behalf of the complainant that an attachment issue against ——, one of the defendants in this cause, or for such other order as the court might think proper to grant, and the said papers having been read and duly considered, it is ordered that the said defendant ——, do pay to the complainant his costs of this application, and also the costs incurred by the said complainant in consequence of the said —— not appearing before E. H. one of the Masters of this court, to attend to a hearing of the matters in referrence before said Master in this cause pursuant to the requisitions of a summons served on said —— for that purpose, and that the said —— do also forthwith attend before the said Master at such time and place as the said Master may appoint, or that an attachment issue against him.

No. 3. *Examination of a Defendant as to Testator's Real and Personal Estate.*

In Chancery:
Between, &c.

The answer and examination of the above-named defendant G. M. to the interrogatories exhibited by or on the part and behalf of the said complainant, before J. J., esquire, one of the Masters of thiscourt, for the examination of the said defendant, pursuant to the decree made on the hearing of this cause, bearing date, &c.

To the first interrogatory, this examinant saith, that he did not personally, upon the death of H. H., the testator in the pleadings of this cause named, interfere with or enter into the receipt of the rents and profits of the said testator's freehold estates, or any part thereof; but this examinant believes, that Mr. ——, of, —— &c. who was the Solicitor for the said testator in his lifetime, and who, this examinant is informed and believes, was appointed by the said testator steward and receiver of the rents and profits of his the said testator's freehold

CHAP. II.

estates, hath received to the use and on the account of this examinant, as well subsequent to the death of the said testator, as subsequent to the time of putting in this examinant's answer to the complainant's bill in this cause, the several sums of money particularly mentioned and set forth in the first and second schedules to this examination annexed, and which this examinant prays may be taken as part thereof; the first of such schedules containing an account of the rents and profits of the said testator's freehold estates received by the said Mr. ——, to the use, and on the account of this examinant, as were devised by the said testator's last will and testament in the pleadings mentioned; and the second of such schedules containing an account of the rents and profits of the said testator's freehold estates, (received by the said ——, to the like use, and on the like account,) as descended to the said testator subsequent to the making of his said last will and testament; and this examinant further saith, that the said first and second schedules to this his examination annexed are, and do contain, a just and true account of all and every the sum or sums of money received by this examinant, or by any person or persons by his order, or for his use, as well previous as subsequent to the time of putting in his answer in this cause, for or in respect of the rents, issues, and profits of the said testator's freehold estates, or of any part thereof, and when such sums of money, and every of them were received, and from whom, by name, and for what estates in particular, distinguishing the devised from the descended estates of the said testator, and the times when such sums of money, and every of them, accrued due and became payable; and also a true and just account, as far as this examinant has been able to ascertain the same, of all and every sum and sums of money which now remain due and unreceived; and from whom, by name, for or in respect of the said estates, and for what estates in particular.

To the second interrogatory, this examinant saith, that he hath paid, expended, disbursed, and allowed the several sum or sums of money, in respect of the

said testator's freehold estates, mentioned and set forth in the third schedule to this his examination annexed, and which he prays may be taken as part thereof; and this examinant further saith, that the said third schedule contains a true and just account of all and every the sum and sums of money so paid, expended, disbursed, or allowed, by this examinant; and the times when, and to whom, and for what, and upon what account, such sums of money, and every of them, were so paid, expended, disbursed, or allowed, and for what estates in particular, distinguishing the devised from the descended estates of the testator.*

To the third interrogatory, this examinant saith, that the said H. H. was not, to the best of this examinant's information and belief, at the time of his death, possessed of, entitled to, or interested in, any other goods and chattels, leasehold estates, property in the public funds, government debts or debt, sums or sum of money, or other personal property or effects whatsoever, other than and besides what is mentioned and set forth in this examinant's answer to the said complainant's bill in this cause, and to which this examinant craves leave to refer; and this examinant further saith, that he this examinant hath since the death of the said testator got in and received to his this examinant's use, the several goods, chattels, household estates, property in the public funds, government security or securities, debts, sums of money, and other personal property and effects mentioned and set forth in the fourth schedule to this his examination annexed, and which this examinant prays may be taken as part thereof, which respectively belonged to the said testator at the time of his death; and this examinant further saith, that he hath in the said fourth schedule set forth, according to the best of his knowledge, information and belief, a full, true, and particular account of all the goods, chattels, leasehold estates, property, and effects whatsoever, not hereinbefore particularly mentioned or set forth, which the said testator was

* This distinction, of course, obtains only where the circumstances and the interrogatories may require it; and so of other matters in all precedents. Grant.

CHAP. II.

at the time of his death possessed of, or entitled to, or interested in, with the particular natures, kinds, qualities, quantities, full, true, and utmost values thereof respectively, distinguishing what parts or part thereof were or was possessed, got in, and received by this examinant, or by his order, or for his use, and what parts and part thereof have been sold or disposed of by this examinant, or by his orders, or for his use, and what part or parts thereof were or was possessed, got in, and received by this examinant, or by his order, or for his use, and what parts or part thereof have been sold or disposed of by this examinant, or by his order, or authority, and when, and how, and to whom, and for what respective sums or sum of money; and also an account of such sum and sums of money which have accrued due since the testator's death in respect of interest for monies due to the said testator at the time of his death, or in respect of the rents of any leasehold property, or any dividends or interests of bank stock, or government or other public funds or securities, belonging to the said testator's estate, and which have been received by this examinant; and also such parts thereof as now remain outstanding, and why, and in whose hands or possession, and from whom due.

To the fourth interrogatory, this examinant saith, that the said testator was at the time of his death indebted unto sundry persons, in different sums of money, to the amount and of the particulars in the fifth shedule to this his examination annexed, and which he prays may be taken as part thereof, other than and besides what are mentioned and set forth in this examinant's answer, which were then justly due and owing, as this examinant believes, from him; and this examinant hath also in his said schedule set forth to whom, and for what, and on what security the same were respectively due; and this examinant hath also set forth in the sixth schedule to this his examination annexed, and which he prays may be taken as part thereof, a full, true and particular account of all such sums and sum of money as have or hath been paid by this examinant, or by his order, in or towards the discharge of such debts; and when, and to whom, and for what, and also for and on account of the funeral expenses and legacies of the said testator, or otherwise

in relation to his estate, and the amounts thereof respectively in the whole; and this examinant further saith, that the said fifth and sixth schedules contain the whole of the particulars inquired after by the said interrogatory, so far as he hath been able to obtain or is able to give the same.

No. 4. *Examination of a Defendant under the Decree, as to the Testator's Personal Estate.*

In Chancery:

W. H. the elder, W. H. the younger, and J. H.,

vs.

E. B., widow, E. B., the younger, and A. B., infants, by the said E. B., their mother and guardian, Defendants.

The answer and examination of the said defendant E. B., widow, to interrogatories exhibited on behalf of the said complainants before J. S., esquire, one of the Masters of this court, to whom this cause stands referred, pursuant to the decree made on the hearing of this cause, bearing date the 29th day of November, 1814.

To the first interrogatory, this examinant saith, that she hath in the first schedule to this her answer and examination annexed, and which she prays may be taken as part thereof, set forth, according to the best of her knowledge, remembrance, information, and belief, a full, true, and particular account of all the personal estate and effects which J. B., the intestate in the pleadings in this cause named, was possessed of, or entitled to, or interested in, at the time of his death; and all the particulars whereof the same consisted, and the full, true, and utmost value thereof; and all the particulars thereof: and which of such particulars have and when been received by this examinant, or by any person or persons by her order, or for her use, and how and in what manner, and when and where, and by whom, the same, and every part thereof, have been applied and disposed of; and also an account of all

CHAP. II.

and every sum and sums of money received by sale, or on account of the said intestate's personal estate and effects; and when, and by whom, and from whom, and for what, and on what account or accounts, the same, and every part thereof were or was so received; and what parts or particulars, and to what value and amount, of the said personal estate and effects of the said intestate remain undisposed of, and what is become thereof.

To the second interrogatory, this examinant saith, that she hath in the second schedule to this her account and examination annexed, and which she prays may be taken as a part thereof, set forth, according to the best of her knowledge, remembrance, information, and belief, a full, true, and particular account of all and every sum and sums due and owing to the said intestate at the time of his death, and from whom and for what the same were respectively due; and this examinant saith, that all such debts are simple contract debts, and without any security, and did not carry interest; and this examinant further saith, that she hath in the said second schedule also set forth a full and true account of all and every sum and sums of money, from time to time received by her this examinant, or by her order, or for her use, towards the discharge of such debt or debts, or of any of them become due since the death of the said intestate; and when, and by whom, and for whose use, and for what, all and every such sums respectfully were received, and what sums still remain due in respect thereof, and why such sums have not been gotten in and received, and where the person or persons from whom the same are respectfully due, live and reside.

To the third interrogatory, this examinant saith, that she doth not know any thing of her husband's the said intestate's accounts; and therefore she cannot set forth whether the said intestate, at the time of his death, was indebted to any person or persons, in any sum of money, either on specialty or simple contract.(*a*)

(*a*) 2 Grant 308 9. See further Interrogatories and Exam. as to *testator and his relations'* identity, &c. Eq. Draft. 492.; his estate, effects, account of, &c. Eq. Dr. 492. 503, 498. 508. Hoff. 340-1.

Examinations are not *required* to be signed by counsel, (*b*) and therefore the fee for it is not allowed; though it is said that in England (especially in cases of apparent difficulty) they frequently are so, and then, of course, have been previously perused and settled, or drawn by such counsel.(*c*) The answer and examination are filed with the Master, and a copy is here served on the opposite Solicitor [p. 101.]; but if not, may be obtained from the Master's office. [p. 107.] It may, like an answer, possibly be insufficient, and be therefore excepted to, [p. 106-7.] as will be noticed, [*post* § 49.] and a further examination compelled. [p. 108.]

Parties, oral examinations See forms referred to *ante*

We have seen that parties may be required to attend and be examined orally. The answers and examination are then taken down by the Master or his clerk(*d*) in his presence. As to accounting parties also, the Master may direct the mode of examination. [p. 183.] It is the privilege of a party examined on interrogatories to be attended with counsel.(*e*) It is that of all parties. The master himself sometimes requires the assistance of counsel,(*f*) or the opinion and judgment of a person professionally skilled in the subject of inquiry, as upon an intricate question of title, and may name such person himself.(*g*) On *all* occasions counsel when engaged are to be furnished with every requisite instruction and information, and with timely notice; and on summonses

personals, Eq. Draft, 506.; leasehold and stock in trade, ib. 510.; as to receipts and payments, debts due or owing, funeral expenses, and other charges, money received from rents and profits, or from sale of real or personal, by executors, &c. Eq. Draft. 503. 498. 508-511. 522. 520. 570. Hoff. 340-1; whether the personal estate was laid out in lands, pursuant to testator's will, 2 Newl. 306-7.

(*b*) Counsel's signature is not required to defendant's examination, 1 Ves. 227. nor to that of a sequestrator in the Master's office, 1 Sim. and Stu. 98-99.

(*c*) 1 Grant 388. But see Bla. 234. 236.

(*d*) In England also, *some* matters not requiring the Master's immediate attention, are transacted, for the sake of despatch, before his clerk, such as going through documentary evidence, &c. 1 Grant 258.

(*e*) See 1 Turn. and Russ. 184, &c. 293. n. &c.

(*f*) 1 Grant 258.

(*g*) And if on calling upon the parties for such assistance (as that of a conveyancer in England) on abstract of title, it be denied him, it might justify him in reporting that a title is not made to his satisfaction. But he is not bound to be satisfied with the opinion of a conveyancer selected by the Solicitor. 1 Russ. 408.

CHAP. II.

it is right that the party intending to retain counsel should *state*, that the Master will be attended by counsel.(*h*)

If a party to be examined be not in a competent state of mind to put in his examination himself, the court it is said will appoint some person to put in his examination for him.(*a*) The Master may examine parties under the decree upon different sets of interrogatories, as often as he sees occasion,(*b*) or amend a slip in the original interrogatories, by additional interrogatories, without order.(*c*) As to the mode of examination, and of taking accounts, and excepting to the sufficiency or insufficiency of the examination, and further examination, see(*d*) *post* § 49, 50. Where a party is examined in relation to his own rights, (and not as *witness* merely against *another* party, *post*) the examination is in nature of a bill of discovery, and he cannot be cross examined by his own counsel, nor give evidence in his own favour further than his answers are responsive to the questions put, but may accompany his answer by explanations responsive to the interrogatory, and necessary to rebut any improper interference.(*e*) But though he has a right to give every explanation in relation to the matters *inquired* about, he is not thereby made a witness for himself as to other and distinct matters; and in a case where the Master received the defendant's testimony at large, which had an extensive influence upon the report, a new reference, (the Master being out of office) was directed.(*f*) Where a defendant is examined by the complainant, in relation to the amount due the complainant, on account of certain property sold by the defendant on commission, it is not sufficient for the defendant to refer to his books of account, produced before the Master; but he must give the best answer he can from recollection and information, aided by a recurrence to the books and papers immediately within his controul and possession, accompa-

(*h*) 1 Grant 258. 2d ed.
(*a*) 1 Newl. 325. 1 Grant 261. qu.?
(*b*) Dick. 149.; but see ib. 128.
(*c*) 3 Madd. 280.
(*d*) 1 Johns. Dig. 363-5. 356, &c. 361, &c. 2 J. Ch. 495. *ante* vol. 1. p. 44. and auth's cited, 1 Hopk. 471. 45. cited *ante* vol. 1. p. 209. Exceptions for insufficiency, &c. (*post* § 49.) Further examination, Hoff. 13, 14. 30-5.; form of further exam. ib. 344-; as to mode of accounting, *post* § 50. Hoff. 75-83. 7. 11. 13. 1 Johns. Dig. 163-8. 363, &c.
(*e*) 1 Paige 122.
(*f*) 1 Hopk. 229.

CHAP. II.

Examination of party as witness, ante § 46. p. 157-8. 163. and alphabetical references p. 177. 'parties.' Form of exam. of party defendant as a witness, Eq. Dr. 490. 554. *Examination of witnesses: ante* p. 163. 182. and 'witnesses:' Interrog. for exam. Bla 252. Form of oath or affirmation, Hoff. 352. Bla. 136. 2 R. S. 407-8. See witness sworn specially (at law) 4 Wend. 369. One oath enough, 9 Cow. 30. Form of *demurrer of a witness*, objecting to answer, Hoff. 60-63. 335. 354. No. 27.

nied by such explanations, responsive to the questions put, as are necessary to prevent improper conclusions being drawn from his answers.(*g*)

Where one party is examined as a witness against another party in the same cause, he may be cross examined, like any other witness, by the party against whom he is called, and his evidence cannot be used in his own favour.(*a*) The mode of procuring the attendance of witnesses will be presently adverted to. [§ 48.] Their admissibility or inadmissibility have been noticed [p. 182.] Their examination, except on commission [*ante* § 43. p. 148. &c.] is before the Master in presence of the parties and their counsel, unless otherwise ordered,(*b*) [but see vol. 1. p. 817-18.] and taken down at the time (the Master may proceed de die in diem) by the Master or his clerk in his presence, and the depositions preserved to be used by the court if necessary. [vol. 1. p. 43-4.] If witness refuse to be sworn, or to answer he may be committed(*c*) on special application to the court; even though his answer might subject him to a civil suit,(*d*) but not if it would criminate him(*e*) though he may be *asked* such question, and if he has no objection, may answer, but he should be warned of the consequence.(*f*) Nor can he be committed for refusing *to read* certain entries in a ledger, to which he had referred during his examination, a request to *read* not being a *question*, the power of commitment being construed strictly, and the book if produced by the witness on a subpœna duces tecum, being open to inspection of the officer or Solicitor, whose duty is to examine it with a view to such *inquiries* as may be proper and requisite; as the document is to be used by the party who seeks to make it available to his pur-

(*g*) 1 Paige 247. See 404.
(*a*) 1 Paige 122.
(*b*) Qu. ? 1 Hopk. 362. See Bla. 284. 250. 252. Hoff. 57. 58.
(*c*) 2 R. S. 278. *post* § 48. See 1 Paige 601. 607. 614. as to mode of committing, &c. in another case. English order, Eq. Draft. 621.
(*d*) 2 R. S. 405. § 71-2. 6 Cow. 24. so a corporator against the corporation, 2 R. S. 405 407. 1 Paige 601. 614. 610. See ib. 370.
(*e*) 1 Paige 601. 2 R. S. ib.
(*f*) 6 Cow. 254. Questions criminating witness, cannot be struck out of interrog. for impertinence, but he must demur it is said in writing. See form referred to in margin. Hoff. 60. 63. 335. 354. or refuse to answer, 2 R. S. 405 § 1 Paige 601.

CHAP. II.

and note. Form of *Caption of depositions*. Hoff. 353. No 95 Bla. 144. do. of an adjourned examination, Hoff 354. No. 26. Do. on *cross examination*: see form of when not oral, Bla. 254. 145.

poses as evidence or otherwise.(*g*) A witness may be asked as to his interest,(*h*) [see p. 178.] and if he answer he is interested, may be particularly questioned,(*i*) or after his testimony is given his credibility may be impeached or sustained by other witnesses, [p. 169. 182.] and great latitude is allowed in cross examining the impeaching witness. The proper question to put to a witness called to impeach another is, whether he would believe him on oath. The opposite party may then go into a cross examination to ascertain the grounds of the unfavourable opinion, the means of knowledge of the character of the witness impeached, and the source, extent and duration of the unfavourable reports.(*j*) The testimony of a witness may be excluded by evidence of a conviction for certain crimes, [see p. 182.] but an indictment merely, is inadmissible even to impeach his credibility.(*k*) The general rule is that (although a witness may be afterwards impeached) objections as to a defect of proof must be made at the time, or it will be considered as received by consent.(*l*) The Master has power, where a discretion is given as to admitting testimony, to decide on its relevancy, or the competency of a witness.(*a*) A witness on his *examination*(*b*) may recur to a written memorandum to refresh his memory as to facts to which he is called to testify.(*c*) The adverse party may, after the examination, proceed to a *cross examination*(*d*) [p. 169] viva voce or upon written interrogatories as the Master may direct, and for this purpose may exhibit interrogatories at a subsequent

(*g*) So held on a commitment by commissioners in bankruptcy. Ex parte Isaac. In the matter of Owen 1 Mont. & Mac. 23. *See* 4 B. & A. 356.

(*h*) 6 Cow. 27. 248. 7 Cow. 358. 752 8 Cow. 669. 223. *See* also 2 Wend. 483. 166.

(*i*) 3 Cow. 252 *See* 9 Cow. 65.

(*j*) 4 Wend. 232. 7 Cow. 263.

(*k*) 2 Wend 555.

(*l*) See in equity and at law. 9 Cow. 140. 7 Cow. 334. 537. 5 Cow. 123. 173. 4 Cow. 355. 6 Cow 449.

(*a*) As to his duties and powers, in such case, see 1 Paige 607-8. Hoff. 57 60. 326-336.

(*b*) Witnesses how examined in chancery, 2 R. S. 180-1. *post* ch. 9 § 6 &c. 1 Johns Dig. 356. 595. Wit. exam. at hearing to prove exhibit, may without a special order be examined before Mr. to prove other exhibits, 2 Russ. 253. But see 2 J. Ch. 500.

(*c*) 3 Wend. 142.

(*d*) See 1 Paige 37. 2 Wend. 483. 166. 6 Cow. 682. 7 Cow. 263. 1 Johns Dig. 356. 595. As to cross exam. tending to show improper bias. Hoff. 329. 9 Cow. 65.

period.(n) The refusal of witness to be cross examined is no reason for suppressing his deposition, but the adverse party must at the time enforce such right of cross examination as he has.(o) The Master fixes the time within or at which any proceedings before him shall be had;[vol. 1. p. 42. § 43.] but after the hearing on the reference is closed, he cannot as a general rule receive further evidence, but may, for very satisfactory cause shown, admit it before he has settled his draft report, as where the testimony was discovered after the first hearing.(p).

Attendance of Witnesses.

§ 48.

Vol. 1. p. 44. mode of obtaining the attendance of witnesses. Form of subpœna ad test. Hoff. 351. No. 22. see Bla. 250-1. 138. subpœna *ticket*, Hoff. 351. *Affidavit of service* form *post attachment*. Form rules of court, appx. 2.

The attendance of witnesses is procured by subpœna,(a) or habeas corpus,(b) or compelled by attachment. The subpœna without any precipe, issues of course, [vol. 1. p. 44.] and may be directed into any part of the state.(c) It is similar in general form to that for attendance before Vice Chancellors, examiners or commissioners, blanks for which are kept by the Register, Assistant Register and Clerks.(d) Those forms may be adapted to references before Master, or the blanks may be procured at the stationers. Get the subpœna sealed, serve it as directed by the statute,(e) make and annex to the subpœna, an affidavit of service of the same by showing it under seal, delivering a copy, or a ticket containing its substance, tendering the fees (f) allowed by law, and stating

(n) See Bla. 250. 251. Hoff. 329. 336. The practice also) before examiners and commissioners (in the latter case by special order obtained) may be to delay cross examination and to exhibit interrogatories for that purpose on a subsequent day. 2 Simons 52.

(o) 2 Russ. 253.

(p) See 9 Cow. 747. so on examinations before examiner, after proofs closed, the court by special order has granted a commission to examine a wit. whose residence could not be previously discovered on affidavit of merits, and stating the special circumstances; (1 Paige 646.) or a further examination, where complainant failed to prove defendant's hand writing by the witnesses he had produced. See how order obtained, 2 Simons 229. See further 1 Paige 429. affirmed, 3 Wend. 573.

(a) See Hoff. 47-51. &c. Bla. 250-1. 138. See 2 R. S. 276. § 1.

(b) 2 R. S. 559.

(c) 2 R. S. 276. § 1. But see *ante* p. 152. and vol. 1. 389.

(d) 2 R. S. 179.

(e) 2 R. S. 400. 642. See 4 Cow. 49. 14. J. 357.

(f) Fees of witnesses, or clerk or other officers, attending with records, or surveyor as a witness, see 2 R. S. 642-3. 3 Cow. 352.

CHAP. II.

also that said witness did not attend. Then move for attachment, and take out the same pursuant to the form approved(*g*) by the court. It is of course without service of notice or affidavit on which the order for attachment is granted.(*h*) The affidavit being presented to the Chancellor or Vice Chancellor, he will endorse a direction for the writ and the sum required for bail for his appearance.(*i*) If the bond be forfeited it is prosecuted as directed by the statute; if witness is in close custody, he may be brought up by *habeas corpus*(*j*) on return day of attachment as also directed; if brought up on attachment or habeas corpus, or if he appear pursuant to his security, interrogatories are filed, the witness examined as to his contempt for not appearing to testify, and if without sufficient excuse, fined and imprisoned till he do testify.(*k*) Witnesses(*l*) in obeying a subpœna, as well as parties(*m*) in attending their cause, are privileged from arrest on civil process.

Affidavit of Service of Subpœna ad test.

(Title, commencement, § 7. p. 27. § 17. p. 54.) —— ss.: ——— of ———, being duly sworn, doth depose and say, that on the —— day of ——, in the year one thousand eight hundred and —— he did personally serve on ———, who resides in ———, the subpœna hereto annexed, by showing to him the said subpœna, and delivering to him a written ticket corresponding with the said subpœna, and containing its substance, and at the same time paying to him —— cents: And this deponent further saith, that the said ——— did not attend at the time and place specified in the said subpœna, pursuant to the exigence thereof: that the said witness having made default in his said attendance, he this deponent did afterwards, and on the —— day of —— aforesaid, deliver to him the said ———, a written notice, signed by ———, Esq., one of the Masters of this court,

(*g*) See rules, appx. No. 2. See 2 R. S. 534-6. See *ante* vol. 1. ch. 7. § 37. 1 Johns Dig. 356-61. 7 Cow. 140.
(*h*) 2 R. S. 535. § 3.
(*i*) Ib. 536. § 11. Rules of court, appx. No. 2.
(*j*) Ib. 536. See 559,
(*k*) 2 R. S. 536-540.
(*l*) 2 R. S. 402.
(*m*) Forms of order for discharging them, Eq. Draft. 622. 633.

of which the annexed notice is also a copy. And this deponent further saith, that the said ——— again made default in appearing before the said Master at the time and place specified in the said notice. (*Jurat*, § 8. p. 33.)

Exceptions to Proceedings before the Master.

§ 49. Vol. 1. p. 44. Exception for scandal or impertinence; and insufficiency of an examination. Form of certificate on reference of the insufficiency of examination, Hoff. 344. No. 1. Form of certificate of insufficiency of an *oral* examination, Hoff. 347. No. 12. Form of further examination; objecting to answer a certain interrogatory, Hoff. 344. No. 12. Form of report of impertinence of interrogatories, Hoff. 401. No. 79.

Exceptions to proceedings before the Master are now filed with him, and warrants (summonses) taken out and proceeded upon without any previous *order* of reference obtained as formerly, on motion or petition. Any proceeding may be excepted to for scandal or impertinence, and an examination for insufficiency. But exceptions should be taken before any proceeding had, which might be deemed a waiver. For instance, affidavits [See *ante* § 7.] in support of a state of facts may be referred for scandal, but not impertinence, *after* a counter state of facts and affidavit are made in support of it, and in reply to the former affidavit.(*a*) An order (in England) is not of course for referring a defendant's examination before a Master for impertinence, after the plaintiff has proceeded upon it before the Master.(*b*) As to the practice on exceptions(*c*) to the sufficiency of an examination of a party, the practice [ch. 8. § 55, &c.] in relation to exceptions to answers for insufficiency must be adopted and pursued, as far as the same is applicable.(*d*) On filing with the Master and serving [p. 101.] on the adverse Solicitor a copy of the exceptions which, like those to answer, specify the exceptionable matter, you will take out and serve summonses, in the way before decribed, as to attending and enforcing them, and proceed before the Master *ex parte*, in case of non-attendance by the other side. If the defendant's Solicitor, or Counsel, or both *attend*, the excepted parts of the examination which you conceive not to answer the interrogatories as pointed out in the exceptions, may now be particularly urged upon the consideration of the Master, and opposed by the defendant's counsel by contrary allega-

(*a*) 1 Russ. 380.
(*b*) 2 Sim. and Stu. 578.
(*c*) See the practice (subject to the new order) Hoff. 14. 22-25. 29-31. See 344. Bla. 236-7. 1 Johns. Dig. 356, &c. 361, &c. Eq. Draft. 580-1. See order to refer (now unnecessary) examination of commissioners of sequestration, Eq Draft. 580-1.
(*d*) 1 Paige 630.

CHAP. II. tions and explanation, in the best way he can. The parties will, if exceptions be taken afterwards to the Master's certificate, be confined to the objections before the Master. In deciding, he must take into consideration the relevancy or materiality of the statement or question referred to in the exception. [vol. 1. p. 45.] The test of the *materiality* of an exception is, whether, if the answer excepted to should admit or deny the interrogatory, it would so far assist the plaintiff's equity as to advance his claim to the relief sought by his bill.(*n*) Should the Master's decision be in favour of the sufficiency of the examination, [p. 107-8.] he will report, or give his *certificate* rather, accordingly.(*o*) If the examination is certified to be sufficient, the adverse party cannot re-examine the defendant to the same *point* without the permission of the court.(*p*) If, however, the Master should be of the opinion that the examination was *not* sufficient ,he will then certify accordingly. [p. 108.] This certificate(*a*) is not (in England) open to *objections*,(*b*) requiring no order of confirmation by the court, and if not excepted to in eight days after notice of the filing thereof, becomes absolute of course.(*c*) But here the exceptions are confined to the objections taken before the Master. [Vol 1. p. 45.] No order for leave to add interrogatories for further examination, as in England, [p. 108.] and here formerly,(*d*) is now necessary; but if the examination is reported insufficient, the Master may allow new interrogatories to be added by the adverse party, and the exceptions and new interrogatories must be answered together.(*e*) If defendant do not bring in his further examination, the compulsory process [p. 108.] of attachment may be resorted to,(*f*) as described in compelling the original examination, [p. 183.] or as practised(*g*) in compelling a further answer to a bill. [See ch. 8. § 59, &c.]

To *prepare* an examination for executors, defendants, to interrogatories in the Master's office, similar atten-

(*n*) 13 Price 291. 296.
(*o*) 1 Grant 388-9. See Hoff. 14. 22-31.
(*p*) 1 Paige 630.
(*a*) Hoff. 344. No. 1. 347. No. 17.
(*b*) 1 Grant 389.
(*c*) 1 Paige 636.
(*d*) Hoff. 30. Party may be committed for insufficient examination. See ib. 31.
(*e*) 1 Paige 630.
(*f*) Hoff 30-31.
(*g*) 1 Paige 630.

tion is requisite as in preparing an answer, they being both pretty much alike in their general nature. The interrogatories to be answered in each case must govern you in taking instructions from your client; and for answering them, being upon oath, equal care is required. In difficult cases the assistance of an accountant may be advisable. But it is to be remembered, in *all* cases, that supposing the defendant has, by the schedules to his answer, carried his receipts and payments down to the latest period he could, previously to the filing of his answer, his examination begins only with his receipts and payments subsequent thereto, thus carrying on his accounts from *the foot of his answer* to the time of putting in his examination. The interrogatories are *general*, comprehending the *whole* of the time since the testator's death; but still a repetition of the receipts and payments, comprised in the schedule to the answer, would subject the examination to a *reference* for *impertinence*, as unnecessarily loading the examination, and increasing the expenses in office copies and proceedings; and if *found* so by the Master, that impertinence would be by the court, on motion, ordered to be expunged, the costs of which proceedings would fall upon the defendants. And the same would be the case in a *further* examination; in which, if called for, care must also there be taken to begin the subsequent schedules from the foot of the former examination; and the *title* of such further examination should state it to consist of receipts and payments since the putting in the former; or if there should be no further receipts or payments to be added, then state the fact to be so.(*a*)

Exceptions for scandal or impertinence are also proceeded upon before the Master without any order of reference, and if sustained, the scandalous or impertinent matter may be expunged by the Master(*b*) [See § 49. vol. 1. and *ante* § 5. 20. 49. and ch. 8. § 15, &c.]

(*a*) 1 Grant 425.

(*b*) See Hoff. 325-8. 335. See report of impertinence of *interrogatories*, Hoff. 401. The certificate of the Master, of impertinence in the *examination*, may be referred back for him to state in what respects it is impertinent, 3 Mad 246.

No. 1. *Executorial Account.*

§ 80. Vol. 1. p. 45. accounting before Master.

No. 1. Form of executorial account to be brought into the Master's office, in the from of debtor and creditor pursuant to the new rule of court. See forms of charges and discharges under the former practice, also note: (b) *charge*, Hoff. 348-9. Bla. 243-4. *Discharge* or set off, Hoff. 350. Bla. 246. Charges, claims, &c. &c. which may probably still be retained in practice, viz. charge against executors for neglect, &c. form Hoff. 348. 122-6. No. 2. Provisional charge. No. 3. Charges and claims—charge of simple contract creditor. See another form, Hoff. 349, of a like charge of a creditor under a decree. See affidavits to verify charges *post* No. 4. Charge of a specialty creditor. No. 5. Joint charges of specialty and simple contract creditors. No. 6. Complainant's charge as to subsequent interest. *Affidavits* in support of charges and claims, see further *post* 9 and 14. No. 7. Notice with copy of charge for service. No. 8. Amended, or further charge with notice, (see *ante* No. 2. provisional charge) see also form of further charge and notice Blake, 245. 244. No. 9. Complainant's *charge* as legatee for *money and legacy. State of facts and claim* of a contingent legacy. See also *state of facts* on a reference to make inquiries as to value of goods, &c. Hoff. 349, in order to lay the foundation of a charge. No. 10. A *further state of facts and charges* for monies claimed by defendant under a decretal order. No. 11. *State of facts and objections.* No. 12. *Apportionment* among creditors. No. 13. *State of facts and proposal* for guardian and maintenance. No. 14. *Affidavit* in support of the preceding state of facts.

(In Chancery, title of cause.) The account of the defendant A. B. &c. the executors, in respect of the personal estate of C. D. the testator in the pleadings in this cause named:

Dr.	Cr.
June 14. 1829. To cash found in the house $400 Ditto at the bank of—— $350 (so of whatsoever property the executors know themselves to be chargeable with.)	(Here in like manner will be stated whatever sums the executors have to set off in their own favour.(a)

These accounts [see p. 111-12.] are to be framed in regard to the personal estate in one account, and to the rents and profits of the real estate (if any) in another account. That in respect to the *real*, will of course resemble this (mutatis mutandis) and will consist of receipts and payments. Though the ordinary forms of charges and discharges are not required, and the practice as to accounting is materially varied, yet the forms may be resorted to in framing the *accounts*, and the principles applicable to their allowance are unaltered.(b)

(a) 2 Grant 331. 2d ed.

(b) As to the former manner of accounting how *charged* and *discharged*, and what *allowances* will

Thus the account of a mortgagee in possession may be framed from the usual forms of a charge and discharge, the latter forming the creditor side of his account. When the practice becomes settled, charges and discharges may possibly be wholly laid aside, and other modes substituted. In doubtful cases the court will decide what parties do or do not come within the meaning of *parties accounting* before the Master. Certain charges and claims carried in before the Master, [p. 119, &c.] such as those of creditors, as a charge of a simple contract creditor, or joint charge of several simple contract, or specialty and simple contract creditors, or a bond, or judgment creditor,(*a*) and charges of matters arising incidentally from the account as brought in, do not seem to come within the requisition of a debtor and creditor account. When the accounts are carried in with an affidavit sworn by the defendants to verify the payments, copies will then be served with notice similar to that which is usually served with copy of charges [*post* No. 6.] The complainant's Solicitor, on receiving the copy will investigate, and compare them with his documents, to ascertain what has been received by the defendants, or come to their hands, or which but for their wilful default they *might* have received; therefore the Cr. side must comprise every sum paid, laid out, or expended by the defendants in their *official* character,

be made to the party. See 1 Johns Dig. 163-6. 240. 363. &c. Hoff 75-83. Trust fund, 4 J. Ch. 303 619. 303. 281. 445. As to *books* of account, vouchers, &c. Hoff. 7-13. 81-2. *Charges* (now the debtor side of the account) Hoff. 36-38. 122-6. 344-9. Bla. 240-5. *Discharges* or defendants off set. (now the creditor's side of the account.) As to set off in equity, 2 R. S. 174. 440. 1 Hopk. 239. 4 J. Ch. 11. 287. *ante* vol. 1. p. 265. n. (12.) As to discharge or set off, ib. 1 Hopk. 453. 148. 1 Johns. Dig. 163-6. 376. Hoff. 75-83. 38-9. 350. Hart. v. Ten Eyck, 2 J. Ch. 87-88. and Hoff. 75. &c. 80. 417. 1 Johns Dig, 225. Bla. 222. 242-. 8 283-4. *Calculation of interest, simple and compound, or on partial payments.* 1 Johns Dig. 282-7 363. &c. Hoff. 9-11. 19. 122. 93-121. 243-251. 360-6. 408. &c. 130. Bla. 263-6. 4 J. Ch. 303. 1 Bligh's new Rep. 312. compound or *annual rests*, ib. 5 J. Ch. 497. 1 Hopk. 424. and 2 Wend. 77. 4 J. Ch. 445. 1 Johns Dig. 283. Hoff. 83-90. 243-251. The *balance* reported of accounts, carriers interest when the Master's report is conformed, 1 Hopk. 344.

(*a*) Grant 424. 2 ib. 331. &c. 2d ed. 1829.

CHAP. II.

with the dates and times of payment, persons to whom, and purposes for which, made, paid, or applied; and should also embrace any other executorial claims. But should the accounts first carried in not be deemed sufficient by the complainant, he will then exhibit interrogatories for the defendant's examination in respect of such supposed insufficiency, as has heretofore appeared, and thereupon the defendant may be examined as described. [§ 47. p. 183. 111, 112, &c.]

No. 2. *Provisional Charge.*

In Chancery:
(Title.)

Provisional charge against an accounting executor for improper allowances, &c. on a settlement by him with an agent appointed to manage the estate.

The complainants, in addition to the charges already made against the defendant E. B. charge him provisionally as follows, that is to say: In case the court shall be of opinion, that the defendant S. B. is protected by his alleged settlement with the said E. B. as executor of the test' J. L. dec. or otherwise, from accounting anew with the estate of the testator, or those interested therein, then the complainants will insist that the said E. B. ought to account with the said estate for the following monies, to wit:

1. The amount of all the monies charged and retained by S. B. one of the defendants, in his account allowed by the ex'r, as and for a commission or commissions upon the sale or sales of mortg'd premises of the estate of the testator, in so far as regards that part of the proceeds of such sale or sales which was applied or applicable to the payment of the mortgage or mortgages by which the said premimises were incumbered at the time, supposed to be about $800 00

2. The amount appearing by the said S. B.'s account to have been charged and retained by him as his fee as Solicitor and Counsel in the suit of D. M'C. against the executor and heirs of the testatorabove named 1500 0

3. The fee received and retained by the said defendant S. B. as his retaining fee in this present suit $100 00

4. All such commissions as have been charged or retained by the said S. B. and allowed by the said executor, upon monies received and applied by the said S. B. to his own use, or as his compensation for services, say about 126 00

5. All commissions charged or retained by the said S. B. for receiving monies from, or delivering monies to the said E. B. as executor or otherwise, directly, about 350 00

6. The one half part in amount of all commissions charged and retained by the defendant S. B. and allowed by the executor for receiving and paying monies of the said estate in cases where the said S. B. shall be found to have been entitled to commissions; such commissions being charged and retained as aforesaid at the rate of two and a half per cent. for receiving, and two and a half per cent. for paying, which the complainants allege to be more by one half than a fair and just compensation for the services rendered.

7. And lastly, the complainants insist that interest ought to be charged in favour of the said estate on all the items above mentioned.

H. W. W. Solicitor, and of Counsel for Compl'ts.

No. 3. *Charge of a simple Contract Creditor, Affidavit, and Bill of Particulars.*

In Chancery:

(Title.)

The charge of E. F., a creditor of J. G., late of, &c. deceased, the testator in the decree in this cause named.

The said E. F. charges, that there is due to him for goods sold and delivered by him the said E. F., to the order and for the use of said J. G., in his lifetime, the sum of $5 03, and for which he has no security whatever 25 03

CHAP. II.

Charges and claims carried in before the Master.(a)

And the said E. F. craves leave to add to or alter his charge, as he shall be advised.

——, Solicitor and of Counsel for E. F.

[The *affidavit* by the creditor should state, that testator [describing him] in his lifetime, and at the time of his death, was justly and truly indebted to deponent in the sum of $—— for [whatever the goods were] sold and delivered by deponent to the order and for the use of the said [the testator]; and that he hath never, either in the lifetime of the said [testator] or since his decease, received any security or satisfaction for the said debt; but that the same still remains justly due and owing to deponent; and that the paper writing hereunto annexed, marked with the letter (A) contains a just and true account and particular of the [bread, &c. &c.] so as aforesaid sold and delivered by this deponent to, and to the order, and for the use of, the said [the testator] deceased. [The particular or bill of the debt is, in some cases, not called for.] This affidavit is to be sworn, like all others.[§ 7-8.]

The *bill of particulars* above referred to may be thus:

(A.)

'J. G. To E. F. Dr.

'18—, January —.'

To, &c. &c. (Set forth the particulars of the goods, &c.) $25 03

This paper writing marked (A.) is the same as is referred to in the affidavit hereunto annexed.

T. O.

(The Master who took the affidavit.)

(a) A partner of the testator brought in a charge which the Master refusing to allow, because he was not directed by the decree to inquire whether he was such partner, or take any such account. The Master of the Rolls, on a petition presented for leave to come in, &c. remarked that Masters have made it a rule not to take an account of a partnership unless particularly directed to take partnership accounts, yet they are hardly warranted in making that rule, the order being to take all accounts. But as it appeared that the petitioner's answer had been put in without oath, by a Solicitor conducting the suit for all parties, and that his claim was thus allowed by an apparent assent he never gave, he ought not to be concluded, and therefore referred to the Master to make the inquiry, and to take the accounts of the partner-

No. 4. *Charge of a Specialty Creditor.*

In Chancery:

W. M. and others,
vs.
J. M. and others.

The charge of J. P., a specialty creditor of M. M. deceased, in the pleadings named.

The said J. P. charges, that the said M. M., deceased, was, in his lifetime, and at the time of his death, justly and truly indebted unto him the said J. P., in the sum of $100 of lawful money of the U. S. of America, lent and advanced to the said M. M.; and for securing the repayment thereof with interest, he the said M. M. entered into a certain bond or obligation, bearing date on the 20th day of May, in the year of our Lord 1822, to him the said J. P., in the penal sum of $200, conditioned for the payment to the said J. P., his executors, administrators, or assigns, of the sum of $100, with lawful interest, on the 20th day of November then next ensuing.

And the said J. P. further charges, that the whole of the said sum of $100, together with interest from the 20th day of May last past, is now due and owing from the estate and effects of the said M. M., as by such bond, now in custody of the said J. P., to which, for greater certainty as to the date and material contents, the said J. P. take in refers.

For interest on the said principal sum of $100, from the said 20th day of May now last past, to the —— day of ——, being —— years, —— months, and —— days, at $7 per cent. per annum, the sum of

And the said J. P. craves leave, &c.(a)

ship at the expense of the petitioner. Woolley v. Gordon, 1 Tamlyn. 11. 13. *See* form of petition of creditors for leave to come in and prove after advertisement, stating they had not seen it. Eq. Draft. 469. *See ante* p. 108-9. Creditor's suit—who permitted to prove, 2 Russ. 191. See also in cases of bankruptcy, where creditor is disabled by age and imbecility: other proof admitted, ib. 575.

(a) 2 Grant 335.

CHAP. II.

Joint charges (

No. 5. *Joint Charges of Specialty and Simple Contract Creditors.*

In Chancery;

(Title)

The several charges of W. O., of, &c., C. E., of, &c. specialty creditors of C. K. deceased, the testator in the pleadings of this cause named, and of A. B., of, &c. the above-named plaintiff, A. N., and T. B., of, &c. and J. B., of, &c., three of the simple contract creditors of the said testator.

The said W. O. charges, that there is due to him from the estate of the said testator C. K., deceased, upon his bond or obligation, in writing, bearing date the —— day of ——, 1818, whereby the said C. K. became bound, in the penal sum of $1200, conditioned to be void on payment by him of the sum of $600, as therein mentioned, with interest thereon, at the rate of five per cent. per annum, from the date of the said bond until the day of payment of the said sum of $600, the principal sum of . . . . } 600 00

And for interest thereon, from the first day of November, 1818, to the —— day of ——, 1821, the sum of . . . }

The said C. E. charges, that there is due to her, as surviving executrix of the last will and testament of the Rev. T. E. deceased, from the estate of the said C. K. deceased, under or by virtue of his bond or obligation in writing, bearing date, &c., whereby the said C. K. became bound, in the penal sum of

(a) Creditors, especially in debts of small amount often find it desirable to *unite* their claims into one, to save expense. But each creditor *may* carry in his claim separately, for it is at his own cost. 1 Grant 265. Other charges joint or several, on simple or special contracts, promissory notes, judgments, mortgages, &c. may be readily framed from the above specimens.

	$	cts.
$600, conditioned for saving harmless and keeping indemnified the said T. E., his executors and administrators, of and from the payment of the sum of $350. 4 per cent. stock, (being part of certain trust monies received by the said testator, and applied by him to and for his own use, and also for payment by the said C. K unto M. K. therein named, lawful interest on the said $350 stock half yearly during her life, which hath not been replaced by the said C. K., the principal sum of . . .		
And for interest on the dividends thereon, from the 10th day of October, 1829, (up to which time all interests hath been paid,) until the —— day of ——, 18 , the sum of		
The said A. B. charges, that there is due to him from the estate of the said C. K. for money lent and advanced, paid, laid out, and expended, and for business done as a Solicitor and agent of and for the said testator, the sum of	25	03
The said A. N. and T. B. charge, that there is due to them for goods sold and delivered by them, to the order and for the use of the said C. K. in his lifetime, and for which they have received no security or satisfaction whatever, the sum of . . .	12	17
The said J. B. charges, that there is due to him from the estate of the said testator, under and by virtue of a certain promissory note in writing, bearing date, &c., payable on demand by H. K., now deceased, and the said testator C. K. jointly and severally, and of which said H. K., the said testator, was the representative, the principal sum of.	100	00
And for interest thereon from the —— day of ——, 1829. (up to which time all interest was duly paid,) to the —— day of —— 18—, the sum of . . .		
And the said W. O., C. E., A. B., A. N., T. B., and J. B., crave leave, &c,(a)		

(a) 2 Grant 334.

No. 6. *Complainant's Charge as to Subsequent Interest, Affidavits, &c.*

In Chancery:

Before the Vice Chancellor of —— circuit.

W. H. the elder, since deceased,
W. H. the younger, and J. H.,

vs.

E. B., widow, E. B. the younger,
and A. B., infants, by the said
E. B., their mother and guardian.

The charge of the above-named complainants under the order of the Vice Chancellor of ——, made in this cause, and bearing date, &c., in respect of subsequent interest due to the specialty and simple contract creditors of J. C. B. deceased, the intestate in the pleadings named, from the foot of the report of F. De P. Jr. esquire, made in this cause, and bearing date, &c.

The said complainants charge, that by the said report, it appears there is due to the above-named complainant, as surviving partners of W. H. deceased, under and by virtue of the said intestate's bond, dated the 29th August, 1815, the principal sum of	$700 00
And for interest thereon, down to the 28th April, 1827, the date of the Master's said report, deducting property tax	
That there is now due for subsequent interest on the said principal sum of $700, from the said 28th April, 1827, to the —— day of ——, the date of the said Master's further report, the sum of . .	
Total due to the said complainants, as surviving partners as aforesaid, on the said bond	
That by the said report, there is also due to R. B., of, &c., under or by virtue of the said intestate's bond, dated the 25th day of October, 1813, the principal sum of	250 00

	$ cts.
And for interest thereon, down to the 28th day of April, 1827, as aforesaid, deducting property tax.	
That there is now, in like manner, due to the said R. B. for subsequent interest on the said principal sum of $250, from the said 28th April, 1827, to the —— day of ——, the date of the said Master's further report, the sum of . .	
Total due to the said R. B. on the said bond . . .	
That there is also due to J. H., of, &c. in right of Sarah his wife, under and by virtue of the said intestate's bond to the said Sarah H., (by her then name of Sarah D.,) bearing date, &c. the principal sum of	600 00
And for interest thereon, down to, &c. &c., as aforesaid, deducting, &c.	
That there is, in like manner, due to the said J. H. for subsequent interest on the said sum of $600, from, &c. to, &c., (as above) the sum of	
Total due to the said J. H., in right of Sarah his wife, on the said bond	
That it appears by the said report, there is also due to J. R., of, &c., as executor of W. R., yeoman, under and by virtue of the said intestate's bond to the said W. R., &c. [pursue the whole charge as before.]	
That it appears by the second schedule to the said report, there is due to Mary D., of, &c. spinister, by virtue of a promissory note, dated the 10th June, 1818, for $68, the sum of. . . .	60 00
And for interest on the said sum of $68, to the 2d December, 1823, the sum of	
And for interest on the balance of $60, from the 2d Dec. 1823 to 28th Feb. 1827, the sum of . . .	

CHAP. II.

That there is now due to the said Mary D. for subsequent interest on the said sum of $60, from the 28th April, 1827, to the —— day of ——, the date of the said Master's subsequent report, the sum of .

Total due to the said Mary D. on the said promissory note . .

And the said plaintiffs crave leave, &c.(a)

Affidavits in support: First, of a Charge of a Bond and Judgment Creditor.

In Chancery:

Between, &c.

Affidavits in support of the preceding charges and claims, *ante* p. 119.

(Title and Commencement, § 7. p. 24.) A. B., of, &c. maketh oath, that C. D., of, &c. is justly and truly indebted to this deponent in the sum of $——, on bond, bearing date the —— day of ——, in the penal sum of $——, conditioned for the payment of the sum of $——, with interest for the same, at the rate of — per cent. per annum, which bond is now in the custody of this deponent, and to which, for greater certainty as to the date and contents thereof, this deponent refers. And this deponent further saith, that as a further security for the payment of the said sum of $—— and interest, the said C. D. on or about the —— day of —— did sign and execute a warrant of attorney for confessing a judgment against him the said C. D. in the court of ——, for the sum of $—— debt, by *mutuatus*, besides costs of suit, as of —— term then last past, or any other subsequent term, or to that effect; but this deponent, for greater certainty, refers to the said warrant of attorney; and upon or pursuant to which warrant of attorney judgment was entered up at this deponent's suit, against the said C. D. for the said $—— debt and $—— costs, as of — term in the said year —, as this deponent is informed and verily believes, and as by the record of the said judgment, and to which this deponent, for greater certainty refers, may appear. And this deponent further saith, that the said bond and warrant of attorney were respectively given for one and the same sum of money; and that the sum of $—— is now justly due and owing

(a) 2 Grant 342.

to this deponent on the said bond and judgment, for principal, interest, and costs of suit; and that this deponent hath not received any security or satisfaction for the said sum of $—, or any part thereof, save and except the said bond and warrant of attorney, and the judgment entered up thereon, as aforesaid.(a)

Sworn, &c. (*Jurat*, § 8. p. 33)

Secondly of a Trustee Creditor's Charge.

In Chancery.

Between W. M., L. E., and E. his wife, late E. M., J. M. an infant, by the said L. E., her brother-in-law, and next friend; and M. M., also an infant, by L. O. her next friend, Compl'ts,

and

J. M., M. M., J. O., H W., and H. L., Defendants.

The Rev, A. B. of, &c. maketh oath and saith, that M M., of, &c. gentleman, deceased, in the pleadings of this cause named, was, in his lifetime, and at the time of his death, justly and truly indebted unto this deponent, and the Rev. D. E., of, &c., on bond, bearing date the 17th day of ———, 18—, in the penal sum of $——, conditioned for payment of the sum of $—— of lawful money, with interest for the same, at the rate of 6 per cent. per annum, in trust for E. E., and E., his wife, and the survivor of them, which bond is now in the custody of this deponent, and which, for greater certainty as to the dates and contents thereof, this deponent refers. And this deponent doth admit, that the interest which hath accrued, or become due upon the said bond, hath been paid, remitted, or otherwise satisfied, to this deponent, up to the 16th day of November, now last past, and which was to be paid, as this deponent hath been informed and believes, by the order or direction, or on the account of the defendant J. M.; but this deponent saith, that the whole of the said principal money, or sum of $——, together with the interest thereof, from the said —— day of ——— last, still remains due and owing from the estate of the said M. J. M. unto this deponent, and the said D. E., in trust as aforesaid. And this deponent lastly saith, that the said E. E., in the said bond

(a) 2 Grant 22.

CHAP. II.

named, departed this life the —— day of ——— last past, leaving the said E. his wife, now his widow, him surviving, and who is thereupon become entitled to the principal money and interest secured in and by the said bond. A. B.

Sworn at ———, in the county of C., on the —— day of ———, in the year of our Lord 18—, before me, J. E., Master in Chancery.

Further Affidavit in Support of a Bond Creditor's Charge.

In Chancery.

Between Mm. M. L. E., and E., his wife, Complainants

and

J. M. M. M., an infant, J. O. H. W., and H. L Defendants.

G. G of, &c. maketh oath and saith, that he this deponent, alone, hath from time to time received all the interest which hath accrued and become due, and been paid on the bond or obligation of, &c. in the pleadings of this cause mentioned bearing date on or about, &c. in the penal sum of $——, with a condition thereunder written for making void the same, upon payment by the said, &c. to, &c. (the mother of this deponent,) and to this deponent of the sum of $—— and interest, at the time therein mentioned,(which money was not paid accordingly); and this deponent further saith, that he this deponent, as the son of the said J. G., hath had the management of the affairs of the said J. G, and that no part of the said principal sum of $—— hath been paid either to the said J. G., or to this deponent, but that the whole of the said principal sum of $——, and lawful interest for the same, from the —— day of ——, 18—, is now due and owing to the said J. G. and this deponent, from the estate of the said M. M., deceased; but that all interest for, and in respect of, the said principal sum which had accrued and become due, for or in respect thereof, prior to the said —— day of ———, 18—, hath been fully paid or satisfied to this deponent for the use

of the said J G. and of this deponent. G. G.
Sworn at T, in the county of M. this —— day of ———, in the year of our Lord 18—, before me,(a) J. L. a Master in Chancery.
(See *Jurat*, § 8. p. 33.)

No. 7. *Notice with Copy of Charge.*

(Title.) Sirs: Take notice, that the foregoing is a copy of the complainant's charge against the defendant S. B. filed with F. De P. Jr. Esq. one of the Masters of this court to whom this cause stands referred. Dated, &c. (signed) H. W. Compt's Sol. (addressed) To B. B. Esq. Sol. for defendant S. B.: D. B. O. Sol. for defendant J. D.

No. 8. *Amended or Further Charge and Notice.*

(Title.) The complainants hereby amend their charge against the defendant S. B. by adding thereto the following items of monies to be accounted for by him to the estate of the testator J. L. deceased, that is to say:

Dr. To a note of J. P. dated — payable —— lost to the estate of J. L. by negligence or improper conduct of this defendant,

Aug. 7, 1819, Cash received from J. P. $415
Sept. 25, Do. drawn from bank of Albany. $300 00

And the complainants also crave leave further to amend or alter their said charge as they may be advised. Dated, &c. H. W. Sol. and of counsel for complainants.

Notice endorsed on copy.—Sir, the within is a copy of amendment of complainant's charge against defendant S. B. Dated, &c. Your's, H. W. complainant's Sol. —— To —— Sol. for defendants.

No. 9. *Charge for Money Legacy. Also—State of Facts and Claim of a Contingent Legacy.*

Complainants charge as legatee for money legacy, State of facts and claim of contingent legacy

In Chancery:
Between, &c.

The charge of the plaintiff J. W. for a legacy of $500, given and bequeathed to her in and by the last will

(a) 2 Grant 24.

CHAP. II.

and testament of E. W., deceased, the testator in the pleadings named.

The said J. W. charges, that under and by virtue of the last will and testament of E. W., late of, &c., deceased, there is due to her for a legacy of $500. the principal sum of $500 00

And for interest thereon, from the 9th day of April, 1817, being one year after the death of the said testator, at the rate of 4 per cent. per annum, (the rate of interest directed by the decree made in this cause) to the —— day of ——, being —— years, —— months, and —— days, the sum of

And the plaintiff craves leave to add to or alter this her charge, as she shall be advised.

State of Facts and Claim of a Contingent Legacy.

In Chancery:

Between G. C., J. R., and T. R., Complainants.
and
W. H., J. B., J. T., &c. &c. Defendants;
and
Between, &c. Complainants.
and
F. H., &c., Defendants.

By Original Bill, and Bill of Revivor.

The state of facts and claim of the defendant W. H., as to a legacy given and bequeathed in and by the will of the testator S. R.

That S. R., the testator in the pleadings of this cause mentioned, by his will, bearing date, &c., did amongst other things, give and bequeath unto the above-named defendant W. H. $250, to be paid in seven years after the decease of his the testator's wife; in case his son T. R., or his child or children, lawfully begotten, be living, then in that case the said sum of $250 should be his son's property, or

his children's; and in that case he gave the said W. H., in lieu thereof $100 00

And the said testator, after stating in his said will, that the said T. R. was then beyond the seas, and it could not be ascertained whether he was living or dead, thereby directed, that in case the said T. R., his child or children, lawfully begotten, should and did apply to his trustees, at any time within seven years after the decease of his said wife R. R., then he did thereby give, devise, and bequeath unto him or them all his real and personal estate; and his said trustees were to account with him or them for all monies received by his trustees, except the legacies aforesaid; but in case there should be no such application as aforesaid, then he gave and bequeathed all his real and personal estate to be sold by public auction, and the monies arising therefrom should be given in manner thereinafter mentioned.

That the said R. R., the widow of the said testator, died on the 15th day of August, 1820; and that no claim hath been made by the said T. R. at any time since her death, and therefore the said legacy of $250 becomes payable.

That the said legacy of $250 given by the will of the said testator to the said W. H. now remains wholly unpaid and unsatisfied, with interest at — per cent. per annum, to be computed from the expiration of one year after the testator's death.

Therefore, the said defendant W. H. charges, that there is justly due and owing from the estate of the said testator to him, the said legacy of $250, with interest, at the rate and time aforesaid.

And the said defendant craves leave, &c.(a)

(a) 2 Grant 354-5. See also 2 Newl. 350. 360.

CHAP. II.

For monies claimed by defendant under a decretal order that defendant be credited for all rents without any deduction occasioned by apportionment of receiver. From this *further* state of facts, &c. an *original* state of facts may of course be framed. As to state of facts and proposal &c. on appointing receiver, see ch. 7. §§ 2, 7.

No. 10. *A further State of Facts and Charges.*

In Chancery:

Between G. R., and Mary his wife, Complainants,
and
M. H., &c. &c., Defendants;
and
between the said G. R., and M. his wife, Compl'ts.
and
E. L., and others, Defendants;
and
between the said G. R., Complainant
and
H. S., Defendant;
and
between the said G. R. Complainant,
and
the said H. S. and W. S. Defendants.

By original bill, and bills of revivor and supplement.

The further state of facts and charge of the above named defendant E. L.

That by an order made in this cause by the late Vice Chancellor of the —— circuit, bearing date, &c, it was (amongst other things) ordered, that the Master to whom this cause stands referred should, in taking the accounts thereby directed to be taken, give credit to the said E. L. for all the rents received from the said premises, without any deduction therefrom for receiver's poundage, or of any costs occasioned by the appointment of a receiver.

That the costs of the said defendant E. L. in and about the proposal and appointment of a receiver in this cause, and in and about the passing of such receiver's first account, amount to and have been taxed by the taxing Master at the sum of $——; and the said E. L. therefore claims to be allowed the said sum of $ cts.

Receiver's salary for receiving $588 on his first account,

	$	cts.
That the costs incurred by the said defendant E. L., in and about the passing of the said receiver's second account, amount to and have been taxed by the said Master at the sum of $——— and the said E. L. claims to be allowed the said sum of		
And the said E L. also claims to be allowed the sum of money allowed the said receiver in his two accounts as and by way of poundage on his receipts, which said poundage amounts in the whole to the sum of		
The said defendant E. L. also claims to be allowed the costs of the receiver on passing his said two accounts, amounting in the whole to the sum of		
The said defendant E. L. also claims to be allowed the costs of the complainant on passing the said receiver's said two accounts, amounting in the whole to the sum of		
The said defendant E. L. also claims to be allowed the costs of the defendants H. and S on passing the receiver's said two accounts, amounting in the whole to the sum of		
The like in respect of discharging receiver, and as to last account, as agreed on		

The said defendant E. L. claims the beforementioned sums of money, inasmuch as the same have been allowed to the receiver by the Master to whom this cause stands referred, and by the said receiver deducted from the gross amount of the rent received and given credit for by him in his said account, and to which said gross amount the said E L. is entitled without any deduction as aforesaid.(a)

And the said defendant E. L. craves leave, &c.

(a) 2 Grant 357.

CHAP. II.

State of facts and objections.

No. 11. *State of Facts and Objections to a Creditor's claim.*

In Chancery.

Between, &c.

The state of facts and objection of the compl'ts to the claim of D. E., of, &c., as a creditor upon the estate of W. R., the testator in the decree in this cause named, for and in respect of a debt by mortgage of $—— and interest under the decree in this cause.

That the said mortgage debt of $—— and interest claimed before the Master to be due from the estate and effects of the said W. R., the testator, to the said D. E., under and by virtue of a certain indenture, bearing date, &c., and made between, &c., whereby, &c., ought not to be allowed against the estate and effects of the said testator, for that no consideration in money, or other good and lawful consideration whatever, was given or paid by the said D. E., or by any other person or persons for his use, or on his account to the said W. R., or to any other person or persons whomsoever by his order or for his use, either at or previous to the date and execution of the said indenture, or at any time subsequent thereto, [state the facts upon which the objection is grounded]. That, under the circumstances hereinbefore set forth, and inasmuch as, &c., [whatever the material point may be,] the said plaintiffs are advised and insist that they have a right to avail themselves of all existing laws, rules, and regulations of the said company, [or any public act, as the case may be.] And the said compl'ts submit that the claim of the said D. E., in respect of the said mortgage and interest as aforesaid, ought not to be proved or allowed in this cause.

And the compl'ts crave leave, &c.(*a*)

No. 12. *Apportionment among Creditors*

State of facts and apportionment among Creditors.

In Chancery.

Between T. H. G., on behalf of himself and all other the creditors of T. B. P., Esq., deceased., Compl'ts.

and

(*a*) 2 Grant 374.

C. E and M. his wife, late M. T., W. E., A. T., and others, Defendants;
And between the said T. H. G., Compl'ts.
and
L. H. and J. P., Defendants.

The state of facts and apportionment of the compl't, pursuant to the order dated the 27th day of June, 1825.

That by the said order it was directed, that Mr. D the Master, should after the taxation of the costs of all parties as therein mentioned, compute subsequent interest on the principal sum of $—— in his report, dated the 20th day of May, 1825, stated to be due to the defendant F. R., and on such of the debts in the schedule to the said report mentioned as carried interest, after the rate of interest they respectively carried; and it was ordered, that the $—— per cent bank stock, standing in the name of the (Assistant Register) of this Court, in trust in the cause G. *v.* E. should be sold, and out of the money to arise by such sale, it was ordered, that what should be so taxed for the said costs should be paid as therein mentioned; and out of the residue thereof, it was ordered, that the sum of $47 18, in the said report stated to be due to J. E. for the funeral expenses of the testator T. B. P., should be paid to the said J. E.; and it was ordered that the Master should apportion the residue of the money to arise by the said sale (after the several payments thereout aforesaid) amongst the said F. R. and the several other creditors of the said testator named in the schedule to the said report, or the personal representative or representatives of such of them as should be dead, according to what he should find to be due to them respectively.

That the said costs have been taxed as follows: that is to say,

The costs of the said compl'ts at the sum of
The costs of the said defendants C. E. and M. his wife, E. A. F., M. M., and E. D. at the sum of . . . . . .
The costs of the defendant L. R. at the sum of

CHAP. II.

The costs of the defendant W. C. at the sum of
The costs of the defendant M. P. at the sum of
The costs of the defendant S. H. at the sum of
The costs of the defendant L. B. W. at the sum of
The costs of the defendants F. R. and W. V. at the sum of . . . . . .
The costs of defendant H. T. at the sum of
The costs of the defendants L. H. and J. P. at the sum of

That the whole of such costs amount together to the sum of . . . . . .
And the same being added to aforesaid sum of $47 18

due to the said J. E. they make together the sum of . . . . . .
That the said $13,615 13 bank stock has been sold, and the same has produced the sum of $——— cash.
That after the payment of, or providing for the said sum of $———, there will remain the sum of $—— cash to be apportioned amongst the said several creditors, pursuant to the said order.
That the subsequent interest computed on the said principal sum of $1500, due to the said F. R. as aforesaid, from the 20th day of May last, the date of the said report, to the —— day of August, 1825, amounts to the sum of $———, which being added to the sum of $———, by the said report certified to be then due to the said F. R. for principal and interest, they make together the sum of $——, now due to him for principal and interest.

That none of the debts in the schedule to the said Master's report carry interest, such debts having been allowed in the penalties or amounts of their respective bonds, or other instruments securing the same.

That the apportionment of the said sum of $——, in respect of the said sum of $—— so

due to the said F. R. for principal and interest, amounts to the sum of $——.

That the respective apportionments of the said sum of $——, to or amongst the several other creditors of the said testator named in the schedule to the said report, in respect of their said debts, or to the personal representatives of such of them as are dead, are as follows: that is to say,

Creditors or their personal representatives.	Amount of debts. $ cts.	Amount of Apportionment. $ cts.
E. A., C. T., E. M., and E. A., the younger, executors of T. C., Esq., late of the —— in the county of ——, deceased	128 00	
J. B., of, &c., in the county of ——, Esq., executor of T. B., late of —— in the county of ——, wine merchant, deceased, who was the surviving partner of C. W., deceased	883 76	
C. C., of S., in the county of G., surgeon	215 30	
R. C. W., and Mrs. B., both of ——, in the county of ——, executor and executrix of T. C., deceased.	151 14	
T. C., of ——, in the county of ——, M. D.	833 00	
J. D., as assignee of S. H., of ——, aforesaid, merchant, an insolvent debtor.	253 30	
R. J., of S. aforesaid, widow, administratrix of W. J., of N., in the county of G., surgeon, deceased.	400 00	
W. P., of —— aforesaid, grocer	297 30	
T. P., of ——, executor of T. P., of S. aforesaid, widow, deceased.	429 12	

CHAP. II.

R. P., administrator *de bonis non* of R. G., formerly of the city of ——, doctor of physic, deceased. } 700 00

And the complainant craves leave, &c

From this document an apportionment among *legatees* may be framed.(a) See report of costs and apportionment, *post* § 52. No. 2.

No. 13. *State of Facts and Proposal for Guardian and Maintenance.*

In Chancery:

Between T. E. B. an infant, by J. B her father and next friend, Complainant,

and

J. M. (since deceased) and J. B. Defendants;

And between the said T E. B. Compl't,

and

E. B., T E. B, J. B and J B. Def'ts.

State of facts and proposals. p. 114-17.

The state of facts and proposal of the above-named complainants under the order of the Vice Chancellor (of the ——circuit) bearing date &c.

That by the decree made on the hearing of the first mentioned cause on the —— day of ——, it was referred to the Master, Mr. T., to take the usual accounts of the personal estate of E. E., the testatrix in the pleadings of these causes named, and also of her debts; and also to as certain the clear residue, and to enquire whether the said compl't's father was in circumstances and of ability to maintain the said compl't; and if not, then to consider what allowance ought to be made for her maintenance and education for the time past since the death of the said testatrix, and for the time to come during her minority, and out of what fund the same ought to be paid.

That the said Master, Mr. T., by his report dated, &c. certified that there had not been any debt proved or claimed before him against the said testatrix's estate, save and except a claim which had been laid before him on behalf of R. E.: but as it appeared to him that such claim could not be substantiated, (&. &c.)

[See further, what the state of facts contains, *ante* p. 116-17. It is sufficient here to add the concluding or charging part only, viz.]

(a) 2 Grant 377.

The said plaintiff, therefore, submits and charges that the said E. B., her mother, is the most fit and proper person to be the guardian of her person and estate during her minority, in the room of the said J B deceased; and that the sum of $——, under the circumstances should be allowed to the said E. B. for the maintenance, education, clothing, and other necessaries of the said plaintiff during her minority, the same to commence from the —— day of —— last.

Affidavit in support of the above state of facts. See p. 118.

And the said plaintiff craves leave, &c.

No. 14. *Affidavit in support of the preceding State of Facts.*

In Chancery: (title as in No. 13.)

(Commencement § 7. p. 24.)—— ss: E. B of, &c., widow, maketh oath that she is the mothor of the above named compl't, as also of the defendants in the second-mentioned cause, which said defendants, with this deponent, are the only near relatives of the said compl's.; and this deponent submits, as the mother of the said compl's, she is the most fit and proper person to be her guardian, she this deponent being willing to become such guardian, and being anxious to do her utmost for the welfare of the said compl't and this deponent further saith, that the said compl't is now of the age of sixteen years, and is arrived at that period when her education, clothing, and other necessaries have become the most expensive; that for her education alone this deponent will have to pay the sum of——, per annum, independent of her clothing and many articles that will be wanting to enable her to appear according to her circumstances and property; that the deponent is not in circumstances or of ability (having regard to her other children) to contribute towards the education and clothing of the said compl't, and therefore conceives that the sum of $70 per annum will not be more than sufficient for the purpose aforesaid; and this deponent further saith, that the said compl't is not entitled to any other property whatever save the residue of the personal estate of E. T. E., the testatrix in the pleadings of this cause named, which at this time, as deponent believes, consists of $—— three per cent. stock, and

CHAP. II.

$—— cash, now standing in the name of the (Assistant Register) of this Court in the books of the President directors and Company of the Bank of ——, in trust in this cause; a small leasehold property at, &c, producing, as deponent believes, about $—— per annum; and a small quantity of silver plate and other articles, now in the hands of the said J. B., or some person on his behalf. Sworn &c. [jurat § 8.]

[Nᵃ. If in the father's lifetime (he being the natural guardian of his children, and to whom the Court always looks in the first instance,) a *stranger* is proposed as guardian (that is, not the parent but some *friend*.) the Master will require evidence (a clear and strong affidavit by the father will do) of the father's wishing himself to decline the guardianship, and for what reasons, and his desire of such friend being substituted in his room, and assigned to act in that capacity, with his reasons for such desire.](*g*)

§ 51. Vol. 1. p. 45. Special reports. Special report on points before the Master, (exhibiting the *former* practice.)

A *separate* report is frequently desirable, before the *general* report, on some matter detached from the *main* purposes of the suit [p. 114, &c.] This could not heretofore be procured without an express order of the court on special application, and notice to all parties interested. But the object of such separate report is to *expedite*, not to delay the proceedings(*a*) and it should therefore not be indiscriminately allowed. There is an instance, it is said,(*b*) of a separate report having kept a cause in court thirty five years(*c*) It is unnecessary for the purpose of keeping accounts distinct, as that may be done in the general report. It would be improper it seems to allow such report wherever a particular statement may be entered in the general report. It was so held in a suit to redeem, and a reference to take the account, in which case a motion for such report was refused with costs.(*d*) So also a motion was refused with costs, to *restrain* the Master from making a separate report until a month after trial of an indictment for alleged perjury in affidavits in support of charges disallowed by the Master, or until further order, or that it might be made without prejudice to the

(*g*) 2 Grant 385-7.
(*a*) 13 Price 278.
(*b*) ib.
(*c*) Viz. Lewes v. Morgan, 5 Price 42. 62. &c.; again in 1829 3 Younge and Jervis, 230
(*d*) 13 Price 277.

plaintiffs thereafter prosecuting the claim so carried in.(e) Some occasions upon which separate reports would be proper, are of debts and legacies, or infants maintenance, and guardianship as already noticed [p. 114-18.] If for the latter purpose, you will, after having proceeded as directed, [ib. p. 118.] take a copy of the draft separate report when prepared; and peruse and examine it as carefully as it may require, making such alterations or remarks for the *Master's* alterations, as appear to you necessary to be proposed to the Master when you attend him to *settle* it. When you are prepared for that, you will take out a summons to '*settle the draft of*," &c. &c., which summons must be served on all necessary parties as usual.

The *first* must be underwritten, 'the Master has prepared a draft of his separate report,' describing it; which is notice to the parties to take copies, if sufficiently interested to go to that expense. After allowing proper time for those other parties, if any, to peruse and consider the subject, you then take out your other summonses, underwriting them, 'to settle the draft,' &c. &c. These are *attendable* warrants, and being served, are to be acted upon like all others; the Master will, if necessary, as in other cases, on due proof of service, proceed with you alone, and settle the draft. The draft being settled, transcribed and signed (no warrant for this purpose being now necessary) you receive the report, and then file it in the (Assistant) Register *or* clerk's office, there bespeaking, and afterwards calling for, and taking away, your office copy. This being a report on which an order or decree is to be founded, viz. approving or disapproving the Master's proceedings, it requires *confirmation*; but it cannot be *excepted to*. If, therefore, any parties are *dissatisfied* with it, they must appear on the *hearing* of the *petition*, which you will have to present for the confirmation of the report, and which you will, of course, do without delay. The petition must state accurately the proceedings. [See p. 114-18.] adding a statement of the Master's report at large, and praying that such report may be confirmed, &c. and which application the dissatisfied party will

(e) 1 M'Clell. and Young. 573.

CHAP. II.

then oppose. *All* separate reports must be *confirmed* by petition; and no opposition to a report of maintenance, however objectionable to any party, can be made in the way of excepting thereto, but only by opposing the petition for its confirmation; nor can any other separate report be opposed by setting the cause down for the court's opinion upon further directions; but such opposition can be only by a petition to be presented and set down for hearing at the same time as the petition for confirming the report.(*a*) To the *prayer* of this petition, it may be not amiss to add, if the funds in court and other circumstances admit of it, a further prayer, that the costs of, and occasioned by, that application, may be taxed and paid. But various circumstantial considerations (as already remarked, p. 123.) are to be attended to, as to the propriety of applying for those costs on that occasion, or waiting until the end, or some other period of the suit.(*b*) The petitions and forms of proceedings, as well on the original reference for maintenance and guardianship, as where increased maintenance is subsequently applied for, may be drawn from an attentive perusal of the grounds of such proceedings. [p. 114-18. 123. See state of facts § 50.] and being unavoidably prolix, they are, though intended to have been given, [p. 118.] omitted for the present. The conclusion or prayer of the petition for confirmation of the separate report on maintenance, is, as appears in one of the precedents,(*c*) this: Your petitioner therefore prays that the said report may be absolutely confirmed, and that the (Assistant) Register of this court may be ordered to pay the said sum of $—— cash, now standing in his name in trust in this cause, to the said E. B., widow, your petitioner's mother, as a further allowance for the past maintenance of your petitioner to the 5th day of January last; and that the interest and dividends from time to time to accrue and grow due on the $—— bank stock may also be paid to your petitioner's mother, for the future maintenance of your petitioner during her minority, the same to

(*a*) 3 Madd. 439. 1 Grant 399.
(*b*) 1 Grant 398-9.
(*c*) 2 Grant 142.

be paid, and payable, on the 5th January and 5th July, in each year; the first payment thereof to be made on the 5th July next; or that the Chancellor will make such further or other order in the premises as to him shall seem meet.

Special Report on Practice, as it prevailed formerly before Masters.

In Chancery:

J. R. and others vs. H. R. and others. } Special Report dated Dec. 31st, 1817.

State of New-York, ss: In pursuance of a Decretal order made in the above cause, bearing date the thirteenth day of October in the year one thousand eight hundred and fourteen, by which, among other things, it was ordered, adjudged and decreed; that it be referred to one of the Masters of this court to take and state the accounts between the parties in this cause, and report thereon to this court with all convenient speed.

Now therefore I, the subscriber, one of the Masters of this court do report, that the parties complainant and defendant having appeared before me, it was insisted and urged by the counsel for the defendant.—That in proceeding to take the said accounts the complainant should exhibit before the Master his charge or charges in writing; that the testimony in support of the allegations of the parties should be taken by the Master in writing privately and upon interrogatories, and that the depositions of witnesses so taken should not be disclosed by the Master until the whole evidence in possession of either party was adduced; which having been objected to on the part of the complainant and the parties having been heard thereon, I decided according to the established practice of this court.—First, that the charges and discharges of the respective parties should be exhibited in writing. Secondly, that the evidence in support of these allegations to be drawn from witnesses should be taken privately by the Master, in writing, upon interrogatories furnished by the parties respectively; and, lastly, that such evidence should not be disclosed until the whole had been adduced. All which, at the request of the complainants' Solicitor, is respecfully submitted.

J. A. H. Master in Chancery.

CHAP. II.

General Report and Proceedings thereon.

52.

Vol. 1. p. 45. Dr. report, copies, objections, settling, filing, confirmation, and exceptions, *post*. No. 1. Master's report on taking account of the personal estate of deceased, and the administration or other disposition of the same, &c. and an account of pecuniary legacies and of the residuary, real and personal, and an account of what is due to and from the parties in the suit, &c. No. 2. Master's Report (after further directions) of costs (as taxed and bro't in) and apportionment; with schedule annexed. See form of report of the arrears of an annuity: schedule thereto, 2 Newl. 372.3. See other

Copies of the examination or of depositions of witnesses having been obtained (no summons as formerly when the examination was ordered to be in secret,(*a*) to show cause why the depositions should not be made public, being necessary) and the argument before the Master, if any be deemed expedient preparatory to his report being brought on by summons and conducted as in court;(*b*) upon the completion of all matters in the Master's office under the decree, he will prepare the draft of his report, a form of which will be presently given. A report is a Master's certificate [p. 148.] to the court how the fact or matters, referred to him by the court, are or do upon examination appear unto him, or of something which it is his duty to inform the court of.(*c*) Reports are special [§ 51.] or *general*. The Master's general report, as remarked [p. 145.] is the groundwork of the final decree to be made on the hearing of the cause upon *further directions*, consequent upon such report; the main purpose of which is, that it so state the proceedings which have been had before him, upon the inquiries directed by the decree, that the court may have a clear and distinct view of the interests of all parties in the cause, so as to be guided in its determinations upon the hearing for further directions. Before the *general* report is therefore proceeded in, the Solicitors for every party substantially interested in the cause, should be well satisfied that all the directions of the decree have been carried into effect.(*d*) For when the examination is concluded it ought not to be opened for further proof without special and very satisfactory cause shown.(*e*) In this case proof may be received by the Master before the draft report is settled, as where he is satisfied, it was discovered after the hearing.(*f*) If the report be not applied for by parties materially interested in taking the accounts, the defendant or any other party, creditor or legatee, may exercise the right of

(*a*) Bla. 252.
(*b*) Bla. 255.
(*c*) Harr. Grant.
(*d*) 1 Grant 406.
(*e*) 2 J. Ch. 502.
(*f*) 9 Cow. 747.

bespeaking it, and proceed in the cause on account of complainant's delay. [See § 41. vol. 1. p. 42.]

forms of report, Hoff. 28. &c. &c. appx. Bla. 258. 255-7. on partnership accounts ib. Schedule ib. 261. Form of report on computation of amount due, Rule of court appx. No. 13 Settling the draft, objections to the same. No. 3. General form of objections. No. 4. do. where objections are taken by complainants as well as some of defendants, see also forms Hoff. 358. No. 29. and Bla. 261. No. 5. Notice accompanying objections, see also 3la. 263. Signing, filing, &c. For report on further directions and on other occasions, see *post* ch. 4. 7-9.

No. 1. *Report on taking Executorial Accounts, &c.*

In Chancery :(*a*)

Before the (Vice) Chancellor, (of, &c.)

A. C. Mc. W. and F. his wife, W. S. P. and H. H.

vs.

E. B., J M. D. L, W. A. G. T. and M. his wife; S. B.; G. V. L.; G. W. H. and A. his wife; E. L.; E. L.; G. H. Mc. W. and M. T his wife.

Master's Report May 10th, 1826.

To the (Vice) Chancellor (of the —— circuit) of the state of New-York.

State of New-York, ss: In pursuance of an order of this court, made in the above cause, bearing date at the City Hall of the city of New-York, on the —— day of —— in the year of our Lord, one thousand eight hundred and ——, by which, among other things it is ordered, That it be referred to a Master in Chancery, for the state of New-York, to take an account of the personal estate of the said J. L. deceased, at the time of his decease; and of the administration or other disposition thereof, and of the testator's debts and funeral expenses, and whether any part, and how much thereof remains unpaid, if any thing so remains, and that the Master take and state an account of the several pecuniary legacies bequeathed by the said last will and testament of the said J. L. deceased, as well to the complainant, F. as to such of the defendants as are named in the said last will and testament. And how much of the said legacies respectively remains due and unpaid, and to whom, computing interest on the said legacies respectively, from the death of the testator, and deducting what may have been paid to the said legatees respectively, or to others for their use, and by their authority; and that the said Master also take an account of the residuary, real and personal estate of the said J. L. deceased; and of the sales or

(*a*) See this case 1 Hopk. 28-34, &c.

CHAP. II.

other dispositions thereof; and of the proceeds thereof, and by whom, and what remains of the said residuary estate, and the proportions thereof, which belong to the respective parties entitled thereto. And that the Master take and state an account of what is due to and from the parties respectively in their respective characters in the pleadings mentioned; or between them, respectively, and the estate of the testator, and between each other: And with respect to the sums of money retained or claimed out of the estate of the said testator by the defendants, or any of them, as commissions or compensation for services: as the complainants object thereto, it is further ordered, that the Master take an account thereof; and the manner in which the said commissions or compensation have been allowed or liquidated with the defendant E. B., if allowed or liquidated by him, and report the same to the court, with the evidence and his opinion thereon, for the consideration and judgment of this court.

I, the subscriber, one of the Masters of this court, residing in the City of New-York,

Respectfully report:

That I have been attended by the counsel for the respective parties, in the above entitled cause, and in their presence have taken the accounts directed by the above in part recited order, and which accounts I have stated in the schedule hereunto annexed, marked A. B C. D. E. F. and G.; and which said several schedules constitute a part of this my report:

Schedule A., hereunto annexed, contains a statement of the personal estate of the said J. L. deceased, at the time of his death. As far as I have been able to ascertain the same from the books of account of the said J. L. deceased: no inventory of the said estate ever having been taken according to the provisions of the act of the legislature of this state in such case made and provided: the defendant E. B., on being called upon to give an account of the said personal estate, declined giving such account, or any information in relation thereto, except the following statement in writing, viz.

This defendant, (E. B.) in answer to the several charges exhibited by the complainants before T. B. Esq. one of the Masters of this court, against the defendant, says, that he cannot give any account of the personal

estate of J. L. the testator in the pleadings named, at the time of his death, or of the administration, or other disposition thereof; or of the amount of the testator's debts and funeral expenses—no part of the said estate, or any of the books or papers, relating thereto ever having come into the defendant's possession. That the household furniture of the said testator, at the time of his death, was left in the possession of his family, and all monies and securities for monies and books and papers, which belonged to the said testator at the time of his death, went into the hands of the defendant J M'D. L. and who, as this defendant has been informed and will insist, has accounted with the complainants therefor."

Schedule B, hereunto annexed, contains a statement of the debts and funeral expenses of the said testator, as far as I have been able to ascertain the same from the books of the said J. L. deceased, and from the accounts of the respective agents of the said estate: no part of which debts and funeral expenses now remain unpaid.

And I do further report, that I have taken an account of the several pecuniary legacies bequeathed by the said last will and testament of the said J. L. deceased, computing interest on the said legacies respectively from the death of the testator, and deducting payments made to or for account of the said respective legacies, as is directed by the said in part recited order: and which accounts I have in like manner stated in the schedule hereunto annexed marked C; from which it will appear, and I do accordingly report, that there remains due and unpaid, on the day of the date of this report, on three of the legacies hereafter mentioned, as follows, that is to say:

On the legacy to M. A. the sum of ——: on the legacy to El the sum of ——: on the legacy to M. the sum of ——: and that the legacy to F. has been overpaid the sum of —— dollars and —— cents: and the legacy to Em. has, in like manner, been overpaid the sum of —— dollars and —— cents.

And I do further report, that the legacy bequeathed in and by the said last will and testament to the defendant J. M'D. L. has been overpaid: and that there is due and owing on the day of the date of this report, from

CHAP. II.

the said J. M'D. L. to the said estate for principal and interest, after pay ment of his legacy as aforesaid, the sum of ——— dollars.

Schedule D., hereunto annexed, contains a statement of the residuary personal estate of the said J. L. deceased, as ascertained from the books of the said testator, and the agents of the said estate :(*a*) the said residuary personal estate amounting in the aggregate to the sum of ——— dollars, as by reference to the said schedule will particularly appear.

Schedules E. 1 & 2 hereunto annexed, contain a statement of part of the residuary estate of the said J. L. deceased, taken from the books of the said testator, and showing particularly the amounts due from various persons for lands contracted to be sold to them ; the dates of said contracts ; the situation of the lands so contracted to be sold ; together with the names of the persons contracted with.

Schedule F, hereunto annexed, contains a statement of the residuary real estate of the said J. L. deceased, collected from the books of the said testator, and showing the situation and quantity of the said real estate, ascertained from the said books, and from the agents of the said estate.

And I further report that there is, on the day of the date of this report, a balance in the hands of G. V. L. Esq. the general agent of the said estate, unappropriated, of ——— dollars ; and that all the other agents have settled their accounts in relation to the said estate, with the said E B. executor as aforesaid, except the defendant J. M'D. L. who is indebted to the said estate in the sum of ———, as before mentioned.

And I do further report, that I have taken an account of the commissions or compensation allowed by the defendant E. B. to the different agents of the said estate, a statement whereof I have hereunto annexed in the schedule marked G. The evidence produced before me in relation to the said commissions was as follows, viz.

R. T., Esq. was produced and sworn, on the part of the defendant S. B.. and testified, that the witness very warmly solicited Mr. B. to take the agency of this estate ; and he believes that Mr. B. took it with great reluc-

(*a*) Sed vide as to stating evidence of facts, p. 240.

tance. That he considered at the time, and still believes, it was very much for the interest of this estate that Mr. B. took this agency. That Mr. B consulted with him, the witness, as to the compensation proper to be charged in this case, and that the witness suggested two, and a half per cent. as charged by Mr. B. as the proper charge for commissions in this case. That he, the witness, would not have undertaken this agency for less than five per cent. That at the solicitation of Mr B the witness purchased six lots of ground lying at the Corlear's Hook, in the city of New York, part of said estate. The sale had been previously attempted at auction, and was stopped; that his said purchase has turned out to be a great sacrifice. He would not have made this purchase if it had not been for Mr. B.: that his loss on said purchase was fifty per cent.: that said sale was made in the winter of 1814. That witness is well assured, that Mr. B.'s said agency has been very beneficial to this estate, and that his charge for commissions is not unreasonable. That he examined Mr. B.'s letters, &c. and conversed with him and Judge B. before he advised as to Mr. B's charge for commissions. That he, the witness, pays his sub-agents five per cent., and to some seven per cent.; and that the general charge is five per cent. That he thinks Mr. B.'s charge is very reasonable, and that he would not have done it for that amount.

Under the circumstances of this case, I am of opinion that the said commissions are reasonable, and not above the ordinary charge for like services; and I have accordingly allowed them.

In relation to the charges made by the other agents for commissions, no particular objections have been raised by any of the parties against them; nor has any further testimony been offered before me on this subject. And inasmuch as the said charges do not appear unreasonable, or beyond what is usual and customary, I am of the opinion that said commissions ought to be allowed; and I have allowed the same accordingly.

And I do further report, that I have also allowed to the defendant E. B. the sum of 1500 dollars charged by him as a compensation for his services rendered to this estate; which charge is made by him in lieu of all

CHAP. II.

commissions under the act of the legislature of this state, and the rule of this court made in pursuance of said act. This part of the report was overruled. See the case 1 Hopk. 28-47. See also Fulton Bank v. Beach, 2 Paige. 2 R. S. 93. 153.

All which is respectfully submitted.

No. 2. *Master's Report of Costs and Apportionment.*

[See state of facts, &c. p. 221.]

MASTER'S REPORT, 16th August, 1825.

In Chancery:

Between T. H. G., on behalf of himself and all other the specialty creditors of J. B. P., Esq. deceased, Complainant,

and

C. E. and M. his wife, late M. F., W. R. P., since deceased, E. A. F., R. M., since deceased, and M. his wife, E. D., M. C., S. H., J. M., since deceased, L. B., W. O. S., B. P. and R. C., F. R. and M. V., the Rev. H. T., and L. R., Defendants.

And between the said T. H. G. Complainant,

and

L. H. and J. P. Defendants,

By original bill and bill of revivor.

In pursuance of an order made on the hearing of the first mentioned cause on further directions, and on the hearing of the said second mentioned cause, bearing date the twenty-seventh day of June, one thousand eight hundred and twenty-five, and of an order made in the said causes, on the application of John Drayton, assignee of Samuel Harvey, a creditor of the said T. B. P., the testator, bearing date the twenty-eighth day of July, one thousand eight hundred and twenty-five, I have been attended by the Solicitors for all parties; and the costs of these suits, of the defendants W. C., S. H. and L. R. and of the complainant and the other defendants, their subsequent costs of these suits, having been taxed by the Vice Chancellor (*or* taxing master) of the —— circuit, (*a*) the bill of such costs as rendered of the com-

(*a*) *Post* 182. The English form runs thus: 'And in their presence I have considered of the defendants W. C. &c. their costs of these suits as between solicitor and client, &c. and the bill of such costs of the plaintiff amounting to, &c. I have taxed as between solicitor and client at the sum of, &c. 2 Grant 318.

plainant, as so taxed and certified, amounts to the sum of *three hundred*, &c.; the bill of such costs of the defendants C. E., &c. [p. 221.] amounts to the sum of, &c. [So of the rest. See state of facts and apportionment, 220-4.] all which costs, so taxed and allowed as aforesaid, amount in the whole to the sum of one thousand, &c. and which are to be paid out of the money to arise by sale of the thirteen thousand, &c. three per cent. bank stock, as directed by the said order of the twenty-seventh day of June, one thousand eight hundred and twenty five, in manner following; that is to say, the costs of the said complainant to Mr. B. H. his Solicitor; the costs of the defendants C. E. and M. his wife, E. A. F., M. M., E. D., and L. R., to Mr. T. L., their Solicitor; the costs of the defendant W. C. to Mr. W. W. H., his Solicitor, (*and so of the rest*) as the said last-mentioned order directs such payments respectively; and it being directed by the said first-mentioned order, dated, the twenty-seventh, &c. (June 1825,) that I should compute interest on the principal sum of one thousand five hundred dollars, in my report, bearing date the twentieth day, &c. (May 1825) stated to be due to the defendant F. R. and on such of the debts in the schedule to the said report mentioned as carry interest after the rate of interest they respectively carry, I have computed subsequent interest on the said sum of, &c. from the twentieth day of May, one thousand, &c. the date of my said report, to the sixteenth day of August, one thousand, &c. the date of this my report; and such interest, so calculated as aforesaid, amounts to the sum of, &c., which being added to the sum of three thousand, &c., which I found by my said report, bearing date the twentieth, &c., to be then due to the defendant F. R. for principal and interest on his said debt; they make together the sum of three thousand five hundred, &c., which I find to be now due to the said last-named defendant F. R. for principal and interest; and it being directed by the said order, bearing date the 27th day of June, one, &c. (1826,) that I should apportion the residue of the money to arise by the sale of the said bank stock (after the said several payments thereout heretinbefore directed) amongst the said F. R. and the

CHAP. II.

several other creditors of the said testator named in the schedule to my report bearing date the twentieth day of May, one, &c. (1825,) or the personal representative or representatives of such of them as may be dead, according to what I should find to be due to them respectively; and it being by the said order, bearing date the twenty-eighth day of July, one &c (1825,) directed that I should apportion to J. D therein named, alone, such sum of money as I should find to be the apportionment in respect of the debts by my said report certified to be due to the said J. D and to G. B. the assignees of S. H. of —— merchant, an insolvent; and I find that none of the debts in the schedule to my said report, bearing date the twentieth, &c. mentioned, now carry interest, the same having been allowed in the penalties or amounts of the bonds or warrants of attorney securing the same: and I find that the thirteen thousand, &c. bank stock, by the said order, bearing date the 27th June (1825,) directed to be sold, have been sold, and that the same have produced the sum of twelve thousand, &c which is now standing in the name of the Assistant Register of this court, on the credit of the said cause, G. v. E.; and I find that the residue of the said last-mentioned sum, after payment of or setting apart sufficient to answer the said sum of one thousand, &c. so taxed for the complainant's and defendants' costs as aforesaid, and of the sum of forty-seven dollars, [p. 222.] by the said order of the twenty-seventh day of June last directed to be paid to J. E. therein named, making together the sum of one thousand and eighty-three, &c. will amount to the sum of eleven thousand, &c. and I find that the several debts certified by my said report of the twentieth, &c. to be due to the several creditors named in the schedule thereto, amount in the whole to the sum of twenty-two thousand, &c. and to which being added the said sum of three thousand, &c. hereinbefore certified to be due to the defendant F. R., they make together the sum of twenty-six thousand, &c. the particulars whereof I have set forth in the schedule annexed to this my report; and I have proceeded to apportion the aforesaid residue or sum of eleven thousand, &c. amongst the said F. R. and the said several other creditors named in the schedule to my said report, bear-

ing date the twentieth, &c. (including the said J. D. instead of the said J D and G. B.) or the personal representative or representatives of such of them as are dead, according to what I find to be due to them respectively: and I have in the last money column of the said schedule annexed to this my report set forth, opposite to the respective sums of money so due to the said F. R. and such several other creditors as aforesaid, the respective sums of money which the said F. R. and the said several other creditors of the said testator, or the personal representative or representatives of such of them as are dead, are to receive of the aforesaid residue or sum of eleven thousand, &c.; all which I respectfully certify and submit to the judgment of this court.

The schedule to which the foregoing report refers.

Names of creditors, or their personal representatives.

	Principal and interest due.	Amount of apportionment
	$ cts.	$ cts.
E. A., C. T., E. M., and E. A the younger, of ——, in the county of ——, executors of T. C. late of the same place, Esq. deceased	128 00	53 18
J. B. of ——, in the county of ——, Esq. executor of J. B. deceased, who was the executor of T. B. deceased, who was the surviving partner of C. W. . .	883 07	372 02
F. C. spinster, as administratrix *de bonis non* of C. C., late of —, in the county of— deceased,	215 03	90 12
R. C., widow, and W. B. both of —, in the county of —, as executrix and executor of J. C. deceased	151 11	63 16
T. C. of L. R. in the county of ———, doctor of physic .	83 30	35 06
J. D. of L. R. aforesaid, assignee of S. H. of the same place, merchant, a bankrupt . .	253 30	106 12

CHAP. II.

J. D. of —— aforesaid, common brewer, as surviving partner of G. D. and Son . .	163 30	68 14
T. S. of —— aforesaid, mercer	83 30	35 06
J. S. S., G. C. and C. C. Esq. executors of J. W., late of —— in the county of ——, Esq. who was the surviving executor of T. J. late of the county of —, Gent.	743 30	313 16
The defendant H. T., clerk, executor and residuary legatee of E. L. late of —— aforesaid, widow, deceased. So of the rest, see p. 223-4.	300 00	126 76

Report.

The Master may state special matter without any direction so to do.(*a*) And on a party's suggestion, and his own judgment of propriety, state any matter as a bare fact (without setting forth the evidence with his opinion upon it) for the court's information, in the same manner as in a special verdict, and to give an opportunity for its being brought before the court.(*b*) But if he certify a fact, and the report be excepted to, the party who is to uphold the report must produce the evidence of the fact.(*c*) See vol. 1. p. 303 Where the Master stated his reasons why he had disallowed certain sums, not upon the merits, but because, unless he had done so, it would have appeared as if he meant to conclude the defendant, it was his duty to state he did not mean that conclusion.(*d*) When the Master has prepared his draft, and delivered copies to such parties as apply, he will assign a time to bring in objections and settle the draft, and issue his summons *or* warrant accordingly. [Vol 1. p. 45. § 52.] By the English practice, the objections are to be carried in before the Master previously to the expiration of the four day warrant for signing his report; though in peculiar cases the Master may enlarge the time if he see fit; for which purpose a warrant must be taken out, and served, (unless the opposite party consent to some prolongation of the time) and attended, when the Master will give such longer time than the four days for bringing in objections as he deems rea-

(*a*) 2 Atk. 621.
(*b*) Harr. 482,. 1 Grant 269. See 1 Newl. 341-2. Bla. 257-9.
(*c*) 1 Bligh's New Rep. 595.
(*d*) 5 Madd. 209,

sonable.(e) But here no warrant to see the draft, or to sign it, is necessary, and the time to be fixed for bringing in objections is it seems discretionary with the Master.(f) Should any improper delay occur, under colour of time to bring in objections, an order may be obtained, on motion, for the Master to sign his report forthwith.(g)

Notice of Motion for a Master forthwith to sign his Report.

(Title and commencement, &c. § 14. *ante* p. 39. 42.) The defendant above named intends, &c. that Mr. ——, the Master, to whom this cause stands referred, may be directed to sign his report forthwith. Dated, &c.(h) ——, Solicitor for defendant.

To ——, Esq. (the Master.)

Objections.

Objections,(a) where required, are the ground of exceptions; and what exceptions are to reports themselves, objections may be considered as being to the *drafts* of such reports, before finally settled by the Master. The objections in writing are made to the report, if intended to be ultimately excepted to, [*post* § 53.] and must state, article by article, those parts which are intended to be excepted to; but they are necessary only to such reports as require confirmation; as to those reports, (or certificates rather) which do not require confirmation, they are, according to the English practice, excepted to without previous objections. [But see p. 148. and *post* § 54.] Whatever alterations in the draft may, therefore, strike the Solicitors for any of the parties as necessary or proper to be made, such alterations and corrections must be submitted to the Master, on attending him to settle the report; on which occasion conflicting opinions will be ultimately decided upon by the Master. And it should be borne in mind, that the Master, *after* he has settled his report can receive no further evidence, should any have been omitted;(b) and that if exceptions be taken after the report is finally set-

(e) 1 Grant 269.
(f) Vol. 1. p. 45. § 52. p. 42. § 43. See former practice, Bla. 255-8. 223. 263.
(g) Dick. 103.
(h) 2 Grant 187.
(a) 1 Grant 269. See Bla. 223. 255-8. 263.
(b) 1 Grant 406. c. 7 Ves. 587.

CHAP. II.

tled and allowed, at least in cases of reference to take accounts or make inquiries, the parties will be confined, in their exceptions to be taken in court, to such objections as were overruled or disallowed by the Master. [Vol. 1. p. 45. 302. 298.] In a reference to state an account the objections are taken and argued after the draft report is prepared (*c*) In such cases objections may be taken by a party who has not previously appeared before the Master; but he cannot introduce any new matter in evidence to support such objections.(*d*)

General form —of objections to draft report. See also a form in Newl. 375.

No. 3. *General Form of Objections to Master's Report.*

In Chancery:

E. A. }
vs. }
F. G. }

Objections taken by the compl't to the draft of the report in this cause, prepared by ———, Esq. the Master to whom this cause stands referred.

First objection:

For that the said Master hath not in and by the draft of his said report, &c. &c.

Second objection:

For that the Master hath in and by the draft of his said report [or, his said *general report* stated, or] certified, &c.; whereas the said Master ought, &c. &c.

In all which particulars the complainant submits that the draft of the said report ought to be varied and rectified; *or*, in which particulars the said, &c. do object to the draft of the said report, and pray that the same may be varied and altered.(*e*)

See the Report, *ante* No. 1. to which the objections were taken: *first*, for complainants—*secondly*, for certain

No. 4. *Objections by Complainants and Defendants, in the same Suit.* First, *for Complainants.*

In Chancery:

C M'W. and others
vs.
E. B. and others.

(See caption and form of objections No. 3.) The com-

(*c*) 1 Paige 145.
(*d*) 1 Paige 146.
(*e*) 2 Grant 325.

plainants make the following objections to the draft of the Master's report in this cause.

First—Because by the said report the defendant E. B. is allowed the sum of $1500, (besides all the monies paid for his personal expenses,) for the services which he is said to have rendered as executor of the will of the testator during the years 1814, 1815, and 1816. Whereas the complainants insist, that having, by virtue of the will, appointed a general agent or agents to manage the affairs of the estate, which agents were allowed commissions for their services, the executor had no right to claim any compensation to be made to him individually, none being authorized by the will.

Second—Because the Master has, in and by his said draft report, allowed to S. B., one of the defendants, all his charges for commissions, as one of the general agents for the estate of the testator, amounting to five per cent. on all monies that came into his hands as such agent, and charged by him as two and a half per cent. on receipts, and two and a half per cent. on payments; and such allowance is stated by the said Master to be made on the ground that the executor had previously allowed the said commissions: Whereas the complainants insist, that the charges of the said S. B. for his said commissions are extravagant in the rate thereof, and to a great extent are altogether unlawful and inequitable; and being so, the executor had no power by the will to allow the same conclusively; and even if he had, the said S. B has waived the benefit of that defence by his answer in the cause, and is, by the decree of the court liable to account anew in favour of the estate.

Third—Because the Master has not, by his said report disallowed the charge of $100, paid by the defendant G. V. L. out of funds of the estate to the defendant S. B., as a counsel fee in this cause: Whereas the object of the bill is to call both those defendants, together with the executor and others, to an account, and the merits are not yet decided.

Fourth—Because, if the monies allowed and paid to the said S. B. as mentioned in the last two objections, were in whole or part improperly allowed and paid to him; and if he is nevertheless discharged from all lia-

defendants, insisting also upon the objections taken by complainants. See exceptions founded on objections, *post* § 53. No. 4. See the case, 1 Hopk. 28.

CHAPII. bility to account therefor, by reason of any thing which has been done by the executor, then the executor ought to account for all such monies: Whereas the executor is not, by the said draft report, held liable to any account in that behalf. In all which particulars the complainants are advised that the said report is erroneous, and ought to be corrected.

H. W. W. Solicitor, and of
Counsel for Complainants.

Secondly, for Defendants.

In Chancery:

E. L., J. F., and E. his wife, G. N. M'W. and M. T. his wife, and A. H., who are impleaded with J. M'D. L., E B., W. A. G. T., and M. his wife, S. B. and G. V. L.

ads.

A. C. M'W., and F. C. G. his wife, and W. S. P.

(Caption, see No. 3.) The defendants E. L., J F. and E. his wife, G. N. M'W., and M. T. his wife, and A. H., make the following objection to the draft of the Master's report in this cause, viz. That in and by the said report, it appears that the said Master has allowed to the defendant S. B divers charges which he claims a right to make against the estate of the testator in the pleadings named for commissions on services alleged to have been rendered by him in the settlement of that estate in virtue of an alleged appointment of him by E. B the sole qualified executor under the last will and testament of the said testator as the agent under the said executor to have the charge and management of the said estate. And these defendants further claim the benefit of the objections to the said report made on behalf of the complainants. Wherefore these defendants respectfully insist, that the said report in the matter above objected to, and in the matters objected to by the complainants, is erroneous, and ought to be corrected.

G. W. S. Solicitor
for said defendants.

No. 5. *Notice Endorsed on Copy of Objections.*

(Title) The within is a copy of the objections made by (or filed on the part of) the complainants *or* some of the defendants to the Master's draft report in this cause, Dated, &c. Your's, &c. G. W. S. Solicitor for said *defendants*. To J. A. J. Solicitor for defendants T. and wife.

No. 6. *Notice of Withdrawal of Objections on Master's Calling in his Report.*

In Chancery:

A. C. M'W. and others
vs.
E. B. and others.

Sir, Take notice that the objections heretofore taken by the complainants to the draft of the Master's report in this cause, are withdrawn, the said draft report having been called in by the Master. 8th August 1830.

Your's, &c

H. W. W. Solicitor for Complainants.

To G. W. S. Esq. Solicitor for some of the defendants.

Settling report, &c.

When all parties are before the Master to settle his draft report either with or without objections in writing (these being necessary only as a ground for future exceptions) each one prefers his reasons, if needful, for any alteration or addittion; which if opposed, the matter is discussed and gone through, until the draft of the report be finally settled, and sanctioned by the Master. So if objections be taken, they are not required to be prepared by Counsel, but usually are, and especially when attended by counsel, in cases requiring it, and when left in the Master's office, and copies with notice served, a summons is taken out and served 'to proceed on the objections.' On the day assigned by the Master for return of summons, the objections are discussed before the Master, and he alters or does not alter the draft of his report, as he may see fit; and either party ultimately will take exceptions to the

CHAP. II.

report if dissatisfied with the Master's determination.(a) The general effect of settling the draft, is to preclude further evidence, and if no objections be taken, to preclude exceptions to the report. [p. 241. and *post* § 53.] But where by accident or suprise, the party taking objections to the draft, has not had an opportunity of carrying them in, the court will on motion, supported by affidavit of the facts, give leave to except, as where the warrant (summons) though served on the clerk did not come to the knowledge of the Solicitor (b) So also it has been held in England that the court will on motion, if it see reason to be dissatisfied with the report, refer it to the Master to *review* his report, with liberty to take objections to it.(c) But not after confirmation, so long as the original decree exists,(d) and especially after consequential directions. It has been held in England, not to be in the power of the Chancellor to order a report to be reviewed after it is confirmed and followed by a decree of the Master of the Rolls, so long as that decree stands.(e) But the court has in very strong cases, as where there was a palpable error in the report, not where it goes to the substance of the bill, permitted and directed the Master to review his report after confirmation.(g) The Master may while the proceedings are before him, if *ex parte*, open the same for review on payment of costs. [vol. 1. p. 43 § 45.] The report being settled, engrossed, paged, signed, and properly indorsed, [§ 6 p. 23.] (no summons to sign the report being necessary now, as formerly(h) it is filed

(a) 1 Grant 269. *ante* vol. 1. p. 45. § 52. *See* Bla. 255-8-263. In reference of title in suit for specific performance, or in any similar case, the abstract of title being left, objections to the title may, as the most convenient mode of proceeding, be carried in by the party impugning the title. If he do not proceed the plaintiff (if the vendor) may take out warrants, which not being obeyed the Master will proceed ex parte, in the usual manner. The claims of mortgagees are sometimes resisted, in the Master's office by objections carried in. 1 Grant 270.

(b) 3 Madd. 439.

(c) 1 Madd. 340. 555. 1 Dick. 290, See 4 J. Ch. 303.

(d) 1 Wils. Ch. R. 471.

(e) 1 Swanst 154. but see the instances cited ib. in *note*. See further 1 Jac. and W. 39.

(g) 1 Jac. and W. 46. See the cases, 1 Swanst. 156 n. (a) Error in computation Coop. Ch. 184. See 18 Ves. 443. 4 J. Ch. 303.

(h) Bla. 258.

Papers where filed.

by the Master, within the period required by the new order, [vol. 1. p. 45-6.] in the office of the Register, Assistant Register or Clerk, that is, if the bill or petition had been presented to the Chancellor, all subsequent proceedings in the cause must be filed with the Register or Assistant Register; but if to a Vice Chancellor, then with the clerk of his circuit, who in the first, is the Assistant Register, in the third the Register.(i) See *ante* p. 9-12.

§ 53. Vol. 1. p. 46. Filing, excepting to and confirming report. No. 1. Common order *nisi*, to *confirm* report also Bla. 267. No. 2. Order *by consent* to confirm it *absolutely* in the first instance. No. 3. Order *nisi* to confirm report *in all things therein not excepted to*, also Bla. 268. No. 4. *Exceptions* to report (see another form of exceptions and notice thereof Bla. 270-1. another on title, 2 Newl. 375-6 and see 20. J. 674. 1 J. Dig. 363-6.) *First general form* with *notice* indorsed

Filing Report, Exceptions and Confirmation.

Until the new order just adverted to, the party interested usually obtained and filed the report, and gave notice of the filing to the opposite Solicitor, (and this may still perhaps be the practice, except as to general reports) and the same or any other interested party on entering an order nisi to confirm it, served a copy of the order, or gave notice thereof, and made affidavit of service.(n) But the Master, as we have seen, now files the report, at least his *general report*, any interested party enters the order nisi; no notice thereof is given, and no further order absolute entered. Consequently the party wishing to except must enquire of the Master, or at the office of the Register, &c. to ascertain if the report be filed, and whether a rule nisi has been entered. For until such rule be entered, or if entered, until the eight days elapse, the report is open to exceptions founded upon prior objections as noticed in the last section, and more particularly treated hereafter, [ch. 8 § 68. vol. 1. same ch. and §.] or without any such objections, as upon exceptions to report on exceptions to answer. [ch. 8. § 63. ib.] But the report until filed is a nullity so far that, as the court will not consider it made until filed, an order grounded upon it would be discharged for irregularity; as an order to amend and to unswer amendments and exceptions at the same time, obtained before filing the report allowing the excep-

(i) See § 33. 34. vol. 1. p. 38. Act of 58 sess. ch. 76. p. 81. repealing § 54 and § 55. of 2 R. S. 177. (referred to *ante* vol. 1. p. 38.)

(n) Bla. 267 8. 460. Affidavit ib. 39 appx.

CHAP. II.

on copy to serve.

Secondly exceptions (extended) for defendant.

Thirdly, Do. for complainants.

No. 5. *Consent* to suppress depositions and withdraw exceptions,

tions.(*a*) Exceptions on the ground of improper admission of evidence, must be made on filing the report; or they are waived.(*b*) [see § 49. p. 199.] No order, where exceptions lie to a report,(*c*) nor a motion, can be made thereon, until the report be *confirmed*, if it be one requiring confirmation, and not a mere certificate in nature of a report.(*d*) [see p. 148.] But exceptions may be taken before an order nisi to confirm, and before it becomes absolute. Merely filing exceptions does not prevent the confirmation of the report; nothing but an order (in England) for setting them down for argument.(*e*) But here an order to confirm the report in all parts not excepted to, may be entered. Cause cannot generally be shown against confirmation of the report, except upon a counter-petition, and no exception to the rule is made in favour of infants; but it is competent to a party to object upon any grounds appearing on the face of the report.(*f*) If exceptions be duly taken, this is shewing cause against the rule becoming absolute, until exceptions are disposed of [ch. 8. § 68.] The court admitting exceptions to a report, whereby money is reported due, if the time of regularly filing those exceptions has expired, proceedings on the report will not be staid without security to pay the money, or bringing it into court, unless the court expressly order otherwise.(*g*)

Confirmation of report.

The *general* report is confirmed on common motion and order nisi. *Separate* reports, [*ante* § 51. p. 226.] though under a decree, are always confirmed on *petition*, as are also the reports on matters referred under *petitions*. [see *ante* p. 227-8. and ch. 4. 5.]

(*a*) Rushton v. Thoughton. 2 Simons 33. 2 Swans. 255. 1 Sim. and Stu. 102. 2 ib. 226. But defendant may file a further answer before the Master has signed his report, and plaintiff is irregular in obtaining an injunction for want of answer, after the Master's report has been signed, but before the report is filed, ib. Sim. and Stu. 226.

(*b*) 5 J. Ch. 441. The Master may be ordered to return the testimony, and the costs will abide the event, 1 Hopk. 364.

(*c*) 2 Sim. and Stu. 300.

(*d*) 1 Grant 145 citing, Mos. 69.

(*e*) 1 Ja. and Wal. 671. Where the parties had proceeded erroneously in arguing questions before the Master, and no cause for fixing either with costs, and the defendant, to prevent confirmation took exceptions, and filed them, the court refused to make him pay the costs, ib.

(*f*) 1 Jac. and Wal. 470.

(*g*) Harr. Grant.

A report on exceptions to answer, is like all similar interlocutory reports, in the nature of a certificate only, no draft being made for the parties' consideration, and requiring in Eng. no confirmation before acted upon; but as soon as obtained is filed and an office copy taken (*a*) But here, if an order to confirm is not actually contemplated by the rule,(*b*) eight days for exceptions must elapse after notice of filing report before it can be acted upon.

No. 1. *Common Order Nisi to Confirm Report.*

(Caption and title, § 32. p. 78.) On filing a report made in this cause by —— Master in Chancery, dated the —— day of ——, and on motion of Mr —— Solicitor for the ——: it is ordered that said report be confirmed unless cause to the contrary be shown in eight days.

Order *absolute* in first instance, by *consent*, to confirm the report.

A report may be confirmed absolutely in the *first instance*, without an order *nisi*, by *consent* of all parties; which in suits strictly amicable, is always done (in England particularly, where an order absolute as well as nisi must otherwise be entered), and frequently, in other suits *sufficiently* amicable to admit of it. In this instance the consent will expedite the *further directions*.(*c*) The Master's report being absolutely confirmed, is complete, and the cause ready to proceed to *further directions*, if any be necessary, and be brought to hearing as hereafter directed. [ch. 8. § 67. &c. 70. &c ch. 9. § 19. &c. see vol. 1. same ch. and §.]

No. 2. *Form of Order Absolute by Consent, to Confirm Report.*

[Caption, title, &c. § 32. p. 78 see consent orders § 31. p 75.] The report made in this cause by ——, one of the Masters of this court, dated, &c. being produced and filed; on motion of —— Solicitor for ——, and with the consent of —— Solicitor for —— *It is ordered*, that the said report, and all the matters and things therein contained, do stand ratified and confirmed by the order, authority, and decree of this court, to be observed and performed by all parties

(*a*) 2 Grant 275.
(*b*) R. 56. Vol. I. p. 294.
(*c*) 1 Grant 268-9. *ante* § 31. as to consents.

CHAP. II.

thereto, according to the tenor and true meaning thereof. (*h*)

(Signed) —— Solicitor for complainant.
——, Solicitor for defendant.

No. 3. *Order Nisi to Confirm Report in all Parts not Excepted to.*

In Chancery:
A. C. M'W and F. C. G. his wife, and W. S. P. } Caption p. 78.
vs
E. B.; J. M'D. L.; S. B. and others. }

The report of T. B. Esq. one of the Masters of this court, having been filed in this cause, bearing date the twenty seventh day of September in the year of our Lord one thousand eight hundred and twenty three; and sundry exceptions to the said report having been duly taken and filed on the part of the complainants; and certain exceptions thereto having also been filed on the part of E. L.; A H.; J. F. and E. his wife, G. H. M'W. and M. his wife, some of the defendants in the said cause: On motion of H. W. W. of counsel for the complainants: *It is ordered*, that the said report be, and the same is hereby confirmed in all things not excepted to as aforesaid, on the part of either the complainants or the several defendants, or the several defendants for that purpose above named, unless cause to the contrary be shown within eight days.

Exceptions to reports. *First general form* with *notice* endorsed on copy to serve, *Secondly* exceptions (extended) for defendants. *Thirdly* Ditto for complainants.

Exceptions are allegations in writing, suggesting that some pleading or proceeding in a cause is insufficient, mistaken, or irregular, in certain points therein particularly expressed.(*i*) Both parties may except and the cause be brought on upon such exceptions.(*k*)

Exceptions may be taken to the Master's certificate of the sufficiency or insufficiency of an examination before him [§ 49.] or to his reports, or certificates in nature of reports [see p. 148.] on reference of exceptions for scandal or impertinence, [see ib.] in

(*h*) From 2 Grant 237. the commencement altered and adapted to our forms.

(*i*) Hind. 259. c. 1 Grant 271.
(*k*) See 20 J. 674. 677. 861.

any proceeding in court—affidavit [§ 7.] petition [§ 20] bill [ch. 8. § 15.] answer [ch. 8. § 55.] and in the last case for insufficiency also, [ib.] and perhaps to some *separate* as well as the Master's *general* reports already noticed [§ 52. see ch. 8. § 68. vol. 1. p. 302.] All except the first of those certificates in nature of reports, and which are always *before hearing*. are excepted to without previous objections,(c) [p. 148] but to all reports properly so called, *after hearing*, exceptions must always be preceded by *objections*, as already noticed. As to exceptions to *special* reports, *some* of them, as for guardian, or maintenance, [p. 114.] or on petitions respecting infant trustees or mortgagees [ch 4. § 27. 33.] cannot be excepted to in the usual form; but exceptions to such reports in England must be preferred by petition [§ 51. 226 8.] praying that the Master may review his report. As to the *general* report, the *objections* being disposed of and the report not being, in consequence, settled to the satisfaction of all parties; the way is open to the dissatisfied party to *except* to the report, on the ground of those objections, or such of them as were not removed by any corresponding alteration of the draft of the report by the Master. For this purpose instructions may be laid before counsel to prepare the exceptions(a) which are to be drawn, engrossed, paged, properly entitled, endorsed, [§ 6.] signed by counsel, copied, filed, and served. The further proceedings upon the exceptions will appear hereafter. [ch. 8.§ 68. see ib § 63 and vol. 1.] If an order nisi causa has been entered, the exceptions when filed and served will be the *cause shown* against the confirmation, especially if accompanied by notice of hearing for the ensuing term, though this is not, it seems a pre-requisite, as the setting down the exceptions is, in England, for here either party may notice the cause for hear-

(c) But (in England) leave to file exceptions to the Master's certificate is not allowed unless the exceptions are stated, and there be an affidavit stating the facts on which they are grounded 9 Price (Ex.) 215. Exceptions to Master's report of impertinence may be regularly filed after the order to expunge, and at any time before the impertinent matter is actually expunged. 1 Simons 17.

(d) 1 Grant 276.

CHAP. II.

ing on the exceptions, and the new rule seems to contemplate filing and service of the exceptions as sufficient, and authorises an order to be entered to confirm the report so far as it isnot excepted to [v. 1. p 46.]

No. 4. *Exceptions to Report: First, General Form.*

In Chancery:
Between, &c.

Exceptions taken by the said compl't. to the report of J. C., Esquire, one of the Masters of the court of Chancery, to whom this cause stands referred by the decree made in the said cause, bearing date, &c. whereby it was referred to him to see, &c. &c.

First exception.

For that the Master has by his said report certified, that he was of opinion that the defendant may make a good and effectual conveyance, &c. &c.; whereas the said plaintiff conceives, that the said Master ought to have certified that, &c. &c., for the reasons following:

First—For that, &c.
Secondly—For that, &c. (Signed) Solicitor for, &c.
Second exception. ——of Counsel, &c.
For that, &c.(a)
In all which respects, &c. [see conclusions, *post.*]

Notice Endorsed on Copy.

(Title) Sir: The within are copies of exceptions taken by the complainants (or defendants) to the report of —— Esquire, in the above cause, and the original exceptions are on file in the office of the (Assistant) Register (*or* Clerk of the —— circuit) of this court, dated, New-York ——

To —— Esquire. —— Solicitor for
Solicitor for —— ——

(a) 2 Grant 330.

Exceptions (Extended) for Defendant.

In Chancery:
The Phœnix Insurance Co. of N. Y.
vs.
J. B. [see § 6. p. 23.

Exceptions taken by the defendants in this cause to the report made therein on the 1st day of June 1818, by —— Esquire, one of the Masters of this court concerning the account between the parties in this cause touching the matters in the pleadings mentioned.

The said exceptant saith, first, that the said Master in and by his said report refused to consider the real value of the cargo of the said ship Rodman as amounting to the sum of thirty two thousand four hundred and ninety one dollars and twelve cents as stated in schedule A, annexed to this exceptant's answer in the said cause. Secondly, that the said Master in and by his said report, refused to charge the complainants in the said cause with freight, and primage on the proportion of the said cargo, and with a proportion of S. H's expenses and compensation for his agency, as is mentioned in the said answer of this exceptant. Thirdly, that the said Master in and by his said report, refused to allow to this exceptant the amount of the loss occasioned by the difference of exchange between the ports of New-York and Copenhagen, upon the proportion of the salvage due to the said complainants. And lastly, or fourthly, that the said Master in and by his said report has charged this exceptant with interest at the rate of seven per cent. whereas he ought not to have been charged with any interest at all, or the rate of interest with which this exceptant was to be charged, if chargeable with any, ought to have been as estimated, and established in Denmark, and only from the time of filing his answer to the supplemental bill. In which said several matters and respects herein above particularized this exceptant, excepts to the said report, and humbly conceives that the said Master hath erred, and that his said report is wrong, unjust and inequitable, and therefore prays that the said report, so far as it regards the several particulars above specified, may

CHAP. II. be disallowed, rejected, and set aside, and a new report be ordered to be taken with special directions to allow the several particulars which have been disallowed by the said Master.

GEO. W. STRONG, Solicitor for the defendant.
JOHN WELLS of Counsel

Exceptions extended for Complainants.

In Chancery:
J. B. M., B. M'G., and J. B. G., Trustees for all the creditors of J. E. an absconding debtor.
vs.
E. L. and F. T.

Exceptions taken by the above-named complainants to the Report of ——, Esquire, one of the Masters of this Court, made in this cause, and dated the eleventh day of December, in the year of our Lord one thousand eight hundred and twenty-seven.

First Exception.—For that the said Master in taking the account under the order of reference to him, has not made any distinction between J. E. the absconding debtor, in the pleadings in this cause mentioned, and the complainants trustees for the creditors of the said J. E., but has treated them as one person

Second Exception.—For that the said Master, in taking the said account, has caused the sum of three hundred dollars, received by the defendants in the month of January, in the year of our Lord one thousand eight hundred and twenty four, upon the note for nine hundred and thirty-two dollars and twenty-five cents: as also the portions of money received upon the note of J. A. for three hundred and thirty-seven dollars and twenty one cents, after the attachment taken out and the appointment of trustees to the debit of the said defendants in account with the said J. E., when the same, and each of them, should have been debited to the said defendants,

in account with the complainants, as trustees for the creditors of the said J. E.

Third Exception.—For that the said Master, in taking the said account, has charged the said complainants with the sum of one thousand eight hundred dollars, of principal of a bond, dated the twenty-eighth day of January, in the year of our Lord one thousand eight hundred and twenty-two, in favor of F. T., as also certain interest thereon, when they were not chargeable therewith, and when the same was not within the limits of the reference, and had been given to the said F. T. alone, and not to the said E. L. and F. T.

Fourth Exception.—For that, in and by the said report, the said Master has not reported that there was a balance due from the defendants to the complainants, as trustees, as aforesaid.

In all which respects, the said complainants do except to the said report of the said Master, and humbly appeal therefrom to the judgment of this court.

A. S. G., Solicitor in Chancery.
C. F. G., of Counsel.

No. 5. *Consent for Suppression of Depositions and withdrawal of Exceptions.*

In Chancery:

Between A. B. Complainant,
and
C. D. Defendant.

Whereas Master H. by his report, dated, &c. having certified part of the second interrogatory exhibited by the said complainant to be leading, I do hereby consent and agree that so much of the depositions of E. F. and G. H. as hereafter set forth be considered as suppressed, and as if an order was obtained for that purpose, and that the same shall not be read or given in evidence at the hearing of this cause, or on any occasion whatsoever, and that the exception filed to the said report be withdrawn. As witness my hand, this —— day of ——. (*b*)

A. B., Solicitor for Complainant.

(*b*) 2 Grant 329.

CHAP. II.

E. F. To the second and fourth interrogatories. 'And that,' &c.

G. H. To the first and fifth interrogatories, 'This deponent saith, &c.(*h*)

MODES OF SETTLING FACT OR LAW.

§ 54. Vol. 1. p. 46. Modes in chancery, of ascertaining facts or settling questions of law. By *references* to *Master*, already treated of, see also *post*. To *register* &c. on points of *practice* (and lately in partition). To *referees* or *arbitrators*, by consent) *Forms* Order of reference. No 2. Order to enlarge time for award. No. 3. Order for further enlargment (as to exceptions to report, see similar form in case of Masters *ante* § 53. and 1 J. Ch. 223). No. 4. decretal order on exceptions to report of referees, and a reference to a Master to re-state the account. No. 5. Order on rehearing of the same, for reference to a Master with liberty to associate merchants. No. 6. Decree of dismissal after an ineffectual reference, see further marginal notes to the above forms. By *reference* or *commission* to take a wife's consent to waive her equity; (see marginal references *post*. By *examinations* before Vice Chancellors, examiners or commissioners, *post* ch. 9. § 6. &c. By *cross bill post* ch. 8. § 31. By the court. By *special case* for opinion of law judges; forms No. 7. of case. No. 8. of judge's certificate. By directing *action at law*. By *feigned issue* or by *reference and issue*, see next §.

The different modes in Chancery of ascertaining facts, and settling questions of law, [vol. 1. p. 46-5 .] are in the same suit either jointly or separately as follows: 1. By references to a *Master* already noticed [§ 36-53 see *post* § 55] 2 A reference of course in partition *to the Register, Assistant Register or Clerks*, to ascertain incumbrances was lately required under the revised statutes, [vol. 1. p 148-9.] but this provision has been recently abolished [see *post* ch. 5. § 35. 38.] In matters relating to irregularities in mere matters of the *practice* of the court, the court on motion or petition may order such matters to be referred to the Register, &c. (as is usually done in England to the two senior six clerks) to *certify* whether such proceedings or process be regular or not, and according to their certificate the parties are to abide, and such certificate cannot be excepted to without particular leave of the court, which is very rarely granted (*a*) The practice of the court when peculiarly within its province to establish, makes the law of the court,(*b*) and though not inflexible,(*c*) yet the constant current of practice is in itself authority,(*d*) and to ascertain it a reference

(*h*) 2 Grant 329.

(*a*) Grant. Harr.

(*b*) 2 Russ. 581. See 12 Ves. 19. 6 Ves 295.

(*c*) *Ante* vol. 1. p. 55. and authorities. But see authorities (b) and (d).

(*d*) 2 Russ. 579. 568. 1 Ves. and Bea. 328. 2 Meriv. 1.

or inquiry, as above, has been (in Eng.) sometimes directed for the information of the court,(e) and is not therefore confined to matters of mere irregularity. 3. By reference to *referees* or *arbitrators*: This reference may blend a submission of questions of law as well as of fact, and the court will not, it seems, in such case interfere with the award unless a gross and palpable mistake be shown.(f) Exceptions may be taken, overruled with costs, and the report confirmed,(g) or overruled in part, and sustained in part, and a reference in this case decreed to a Master to restate the account, so far as the exceptions allowed require it, authorising him to associate merchants, where the question involves mercantile usage, and on the coming in and confirmation of his report of the balance due that execution issue. [see forms *post*, particularly Nos. 4, 5, 6. for the practice in these cases.] If under an order of reference in the cause arbitrators refuse to proceed, the suit may be prosecuted as if there had been no reference made.(h)

No. 1. *Order of Reference to Arbitrator.*

(See caption, title and form of orders, § 32. p. 78. The following is the English form :)—On motion of complainant's counsel, alleging complainant's bill and defendant's answer, and cause being at issue, witnesses had been examined on the part of complainant, and publication had passed in the cause, and complainant and defendant had since agreed to refer all matters in dispute between them in the cause, to the award of ——, and therefore praying that the same may be referred to his award accordingly; on which, and on hearing defendant's counsel, who consented thereto :(a) Ordered by consent, that all matters in difference between complainant and defendant in the cause, be referred to the award, &c., of ——, so as the said award be made in writing, ready to be delivered to the said parties, or

Order to refer all matters in difference in the cause, to the award of an arbitrator nominated by the parties, with special directions.—— (Eng form.) See other forms in Eq. Draft. 632-5, viz. Order referring matters in question to arbitration, the

(e) 1 Sim. & Stu. 357. as what cases, costs of motion become costs in the cause. *ante* p. 60.
(f) 1 Johns. Ch. 220. 1 Price 81. cited, ib. 230.
(g) 1 J. Ch. 220. 230. *ante* vol. 1. p. 47.
(h) 3 Swans 90.
(a) Solicitor's assent is not sufficient, 1 Cha. Ca 86. 2 Grant 295. 2d ed. 1829. Sed qu *ante* vol. 1. p. 36. 39.

CHAP. II.

plaintiff to confess judgment in the pending action at law. Order of reference to arbitrator, who is to examine upon oath; costs to be in his discretion, and no bills to be filed against him as arbitrator. Equity Dr. ib. See *ante* p 19, as to making an agreement of submission to award a rule of court.

either of them requiring the same, on or before the — day of — next, and in case the said arbitrator shall not be prepared to make his award at the time aforesaid, the parties, from time to time, to apply for and consent to such enlargement of the time, as arbitrator shall certify and the court deem reasonable; and also that the costs of the suit and reference, and the award, be in discretion of arbitrator, and that the parties and all witnesses to be by them produced, if required by arbitrator, or either party, be examined upon oath, to be sworn before one of the Master's of the court, and that complainant be at liberty to read before the arbitrator the depositions in the cause, and defendant to be at liberty to examine before the arbitrator, the witnesses to such depositions, and that all deeds, books, &c. in the custody or power of the parties be produced to arbitrator, and that neither party prosecute any action or suit against the arbitrator, or each other, concerning the premises; and if either party shall, by affected delay, or otherwise, wilfully prevent arbitrator from making his award, it is ordered, that he pay such costs and damages as arbitrator shall think just, and adjudge by writing under his hand, and that seven days' notice of any appointment to proceed on such reference, to be given to each party, or their solicitor, be deemed good notice; and if either party, being duly summoned, neglect or refuse to attend arbitrator, he be at liberty to proceed without such attendance, and make his award *ex parte*, and either party to be at liberty to apply to the court to have said award made an order of court. (*a*)

(*a*) 2 Grant 265, 2d ed. 1829. See English form of order to make an *award* an order of court, Equity Draft 611. Notice for that purpose:—Take notice that this court will be moved on, &c or so soon after as counsel can be heard on behalf of the above-named complainant, that the award of I. K., Esq. made in these causes, and bearing date, &c. may be made a rule or order of this court, and that it may be referred to one of the Masters of the said court to tax the costs of the said petitioner, as directed by the said award, &c. of, &c. incident to this application; and that the said defendant, H. G. may be ordered to pay such costs when so taxed. Dated, &c. (signed W. P. complainant's solicitor.) To A. W. defendant's solicitor.) 2 Grant, 184. The power to make an original agreement of *submission* to arbitration an order of *this court* is, it seems, taken away by the Revised Statutes. (*See ante* p. 19.) But as the powers of the court are, in other respects saved, ib., and as the practice of referring matters in pending causes, by consent, has heretofore prevailed,

No. 2. *Order enlarging time of award.*

Order enlarging time for making the award. (Eng. form.)

(Caption and title as before.)—Upon motion by complainant's counsel, stating the order for the award, with liberty for either party to apply to the court for enlargement of the time, and that upon entering upon and investigating the matters in question, it was found necessary that the time should be enlarged, and therefore praying that the time for the said arbitrator making his award may be enlarged to the — day of — next, which upon hearing defendant's counsel, who consented, was ordered accordingly.

(*The arbitrator's certificate* is:)—I request application to be made to the court to enlarge the time for making my award, till ——. A. B., Arbitrator. (*a*)

No. 3. *Order for further enlargement.*

Order for further enlargement of time for making award.

(Caption, &c. ib.)—Upon motion of complainant's counsel, stating the preceding orders, and that it was found necessary *still to enlarge* the time for the arbitrator making his award, therefore praying. &c., which, upon hearing, &c., was ordered accordingly.

(*Certificate:*)—I desire the time for making my award may be further enlarged till —. A. B., Arbitrator. (*b*)

No. 4. *Decretal Order on Exceptions to Report of Referees.*

Decree on report of referees on a submission to reference by consent: on exceptions to report of referees allowing some and disallowing other exceptions, and directing a re-

(Caption § 32. p. 78. Title, viz. Wheeler & Kirkpatrick v. Brackett:)—This cause having been submitted by Mr. Nathan Williams, solicitor for the complainants, and by Mr. T. Sill, solicitor for the defendant, to V. B. and J O. W., as referees, to take the evidence and state the accounts between the parties, subject to the supervision of this court, the same as if taken by virtue of an order thereof. And the referees having taken the evidence and stated the accounts and reported the same, with a balance due from the defendant to the complainants, of fifteen hundred and sixty dollars and fifty-five

(See Roosevelt v. Thurman, 1 J. Ch. 220. See *post* forms of decrees after reference, by consent.) It is presumed that causes may still be referred, and that the award thereupon may be made a rule of court, or that a decree may be had and enforced in the ordinary manner.

(*a*) 2 Grant 286, 2d ed. (*b*) Ib.

CHAP. II.

ference to a master to state the account on exceptions allowed, and on his report decreeing payment, &c.

cents, together with some of the grounds and reasons upon which the report was founded. And the counsel for the defendant having taken exceptions to the said report, and the said solicitors, as solicitors and counsel for the parties, together with Mr. Thomas R. Gould as an associate counsel with Mr. Sill, having submitted the said exceptions, together with the pleadings and proofs and report, and their arguments in writing thereon, to this court for consideration and decision, and due deliberation being had thereon: It is ordered, adjudged and decreed, that the fourth exception is well taken, so far as the same relates to an allowance to the complainants of the following sums as interest on the amount they were in advance, viz —

January	1,	1815,	$140 20
——	21,	——	7 74
January	21,	1816,	143 34
——	—,	1817,	124 43
——	—,	1818,	130 21
——	26,	1819,	135 49
May	26,	——,	48 32

And which items of credit are to be omitted in stating the account, and which items are deducted because the defendant is charged, and properly charged with interest on the sums that his balance of advances falls short of a moiety of the balance of advances of both parties. And it is further ordered, adjudged and decreed, that the fifth exception is well taken, and the sum of $87 52, under the date of the twenty-first January, one thousand eight hundred and fifteen, is to be charged to the firm generally, and not to the defendant exclusively. And it is further ordered, adjudged and decreed, that the eighth exception is well taken, and the sum of $200 72, under the date of February, one thousand eight hundred and sixteen, is not chargeable as a loss to the defendant exclusively, as there is not satisfactory evidence of bad faith in the transaction on the part of the defendant. And it is further ordered, adjudged and decreed, that all the other exceptions be, and the same are hereby disallowed, and that a reference be made to any one of the Masters of this court to re-state the account so far, and

only so far, as the allowance of the exceptions as aforesaid may require it, and to report thereon with all convenient speed, and that the balance which shall, upon the coming in and confirmation of such report, be found due to the complainants, be paid within thirty days thereafter, with costs of suit to be taxed, or that the complainants have execution therefor, according to the course and practice of this court. And it is further ordered, adjudged and decreed, that in the taxation of costs, no allowance be made to either party as against the other, for the costs of taking and arguing the exceptions aforesaid, it being deemed reasonable, under the special circumstances of the case, that a balance as to the costs of these exceptions should not be struck.

No. 5. *Order on Re-hearing of the Last Order.*

Order on a re-hearing upon the 4th exception referred to in the preceding decree, directing a special reference to Master, with liberty to associate merchants, the subject involving a question of mercantile principle and usage in settlement of co. partnership accounts.

(Caption § 32. p. 78. and title as above.) This cause being submitted upon a rehearing touching among other things the merits of the fourth exception to a report of referees in this case, and the same exception involving a question of mercantile usage and principle in the settlement of co-partnership accounts: *It is ordered*, that the report of the referees, together with the decretal order made on the first hearing of the cause, and the arguments of counsel contained in the papers marked No. 1, 2, 3, 4, & 5. and in those parts particularly of papers No. 1. 2, 3. which are included in brackets be submitted to Mr. H. one of the Masters of this court, and that he associate with him, if he shall deem it necessary, one or more mercantile gentlemen, and that he report with all convenient speed his opinion whether according to mercantile usage, and according to just principles in the settlement of such accounts, the fourth exception be or be not well taken.

No. 6. *Decree of Dismissal in Original and Cross Cause after Reference.*

Decree dismissing the original bill, and another decree dismissing a

[Caption § 32. p. 78. title, viz. J. Dorrance v. R. Morrison and L. Clark, administrators, &c. of C. Clark, deceased.

This cause, together with a cross bill and answer, between the same parties having been submitted by the

CHAP. II.

cross bill, after a reference and an ineffectual attempt to settle co-partnership matters.

counsel for the respective parties for further directions upon the pleadings, evidence, and report of referees, *and it appearing* that this cause, together with the said cross cause, had heretofore been submitted by consent under an order of this court to N. H. and J. B. that these referees had been attended by the parties and had heard their proofs and allegations, and which proofs consisting of written, and parol testimony to a great extent have been returned to this court, that the referees were not able to agree on a liquidation of accounts, and were not able to ascertain the amount of debts due the firm of C & D. at the time of the dissolution thereof, nor the debts owing by them, nor the sums either of the partners had received during or since the partnership, nor the sums paid by them or either of them, for partnership or private debts, *and it further appearing* to the court that on the dissolution of the partnership in December 1807, the goods and stock in hand were sold and delivered to the complt. D. and his new partner E. S. and that in May 1808, the said D. & S. gave to C. the intestate a bond in $5000 conditioned to pay certain debts of C. D. to the amount of $2937,72 and to indemnify the intestate therefrom, *and it further appearing* to the court that the real estate purchased with the partnership funds or belonging in law or equity to the partnership during the continuance thereof, was divided and settled between D and the intestate to their mutual satisfaction, and *inasmuch* as the perusal of the testimony leaves the concerns of the partnership in so much uncertainty that a liquidation thereof has been in vain attempted by the referees, and cannot now be made with any certainty or safety, and the better conclusion from the testimony, and from the acts and understanding of the parties is, that little or nothing remained to be settled at the time of the death of the intestate C. and *inasmuch* as the complainant D. waited for nearly five years after the dissolution of the partnership, and until the death of the intestate C. before he filed his bill, it appears to be proper under the peculiar circumstances of this case that no further inquiry be had: *It is thereupon ordered*, &c. that the bill be dismissed without costs to either party as against the other.

In Chancery:
R. M. and S. C. administrator, &c. }
vs }
J. D. }

The bill in the original cause being this day dismissed without costs: It is ordered, &c. that the bill in this cause be dismissed without costs.

4. A reference or commission abroad may be ordered, to take the wife's consent to waive her equity, or to examine her apart from her husband as to the manner in which she wishes money standing to her account in court to be paid.(a)

See forms of order, commission, examination, &c refered to vol. 1. p. 47, n. (4). See examination of a wife entitled under a will to money or stock in a cause in which her husband is complainant, 2 Newl. 276-7. certificate thereto, affidavit of subscribing witness, ib.

5. Examinations before Vice Chancellors, examiners, and commissioners are detailed at large, ch. 9. § 6.

6. A cross bill may be directed in order to bring the subject matter of the suit fully before the court [ch. 8. § 31]

7. The court receives evidence in proof of the execution of exhibits. [ch. 8. § 72.]

8. By special case directed to a court of law.

SPECIAL CASE FOR THE OPINION OF A COURT OF LAW.

In a clear case upon a question of law the court will not send parties before the Master.(b) It is wholly in the discretion of the court whether a case shall or not be sent to a court of law; an heir is not entitled as of right to it.(c) The opinion of a court of law is most usually taken on questions of construction and effect of wills, covenants, &c. involving great doubt and difficulty, and this either by directing a special case, or an action at law. [*post* 9. see vol. 1. p. 46-7.] Upon a case, the courts of law will not give an opinion upon the effect of an equitable devise, but if their opinion is required upon parts of a will which give equitable interests, it is for the court of chancery so to mould the will as to present a legal question for consideration.(d) In this respect the case, of which

(a) See instances of such orders 3 Russ. 91.
(b) 1 Swanst. 459. But see 6 Madd. 16.
(c) 3 Madd. 273
(d) 6 Barn. and Cr. 421. Houston v. Hughes.

CHAP. II.

the following is a mere outline, was defective, and the court of law limited their opinion accordingly.

No. 8. *Special Case on the Construction and Effect of a Devise.*

In Chancery :

Before the Vice Chancellor, &c.

(Titles of the original and supplemental causes. H. L. late of, &c. duly made and published his last will, bearing date, &c. and executed, and attested in the manner required by law for devising freehold estates in the words and figures following, that is to say ; (sets forth *the will.*)

The testator was at the time of making his will, and thence up to and at the time of his death, seized of divers, &c. and was possessed of, &c.

The testator died on, &c. without having altered or revoked his will, leaving, &c. (states his only child as heiress and next of kin, his sisters E. H & C. G. the complainants, and their children ; the death of his child, leaving the complainants her co-heiresses at law, and sole next of kin ; that administration was taken of the goods, &c. with will annexed, of the child deceased, and the administrator is now the legal representative of the child, &c.)

On or about, &c. plaintiffs filed their original bill in the court of chancery against the defendants herein before in that behalf named, and the said J. P. (since deceased,) praying, amongst other things that the will of the said testator might be established, and the rights of the several parties claiming thereunder declared, and that the plaintiffs might be declared under the will entitled to all and singular the messuages, lands, &c. of which the testator died seized, &c. in fee as tenants in common, &c. and to the whole of the personal estate and effects of the testator, subject only to the payment of his just debts, and funeral and testamentary expenses, and legacies, according to the several natures thereof, for their own use absolutely, in equal moieties ; to which bill the defendants appeared and put in their answers. The said original bill was subsequently amended, and afterwards bills of supplement and revivor were filed to bring the

necessary parties before the court, and the original cause, and also the supplemental and revived causes being at issue, came on to be heard before (the Vice Chancellor, &c.) on, &c. when the Vice Chancellor) directed the above cause to be made for the opinion of the Judges of ——, and that the questions should be.

First:—What estate and interest did the said A. R., H. H., and J. P., (trustees named in the will,) take under the will of the testator in (freehold and lifehold estates?)

Secondly:—What, &c., do the plaintiffs, E. H. and C. G., respectively take under the will of the testator (in freehold and leasehold for lives, &c.)

Thirdly: What, &c., do the said R. P., H. P., W. P., &c., the sons of the said E P., respectively take, &c.

Fourthly:—What, &c., do the said E. C. S., &c. the grand-daughters of, &c. respectively take under, &c.

If the court should be of opinion, that by the will, as above stated, the whole legal estate in fee simple in the aforesaid lands and heriditaments of inheritance, and the whole absolute interests in the leaseholds for lives, were vested in the said A. R., H. H. and J P.; then in case they had been merely devisees to the uses, and the legal estate had not remained in them.

Fifthly:—What estate and interest would the persons enumerated in the second, third and fourth questions have respectively taken under the will of the said testator in the said freehold lands and hereditaments, and in the said leasehold for lives respectively?(a)

No. 9. Judges' Certificate on the above case.

This case has been argued before us by counsel. We have considered it, and we are of opinion that the said A. R., H. H and J. P, took under the will of the testator an estate in fee simple, in the freehold lands and hereditaments in which the said testator had, at the time of his death, an estate of inheritance to him and his heirs. And we are of opinion that the said A. R., H. H. and J. P., took the whole interest which the said testator, at the time of his death, had in the lands and

Judges' certificate. 6 Barn. & Cr. 421. see other forms. 2 ib. 357, 6 Durn. & East 307.

(a) 6 Barn and Cr. 421. But see n. (a) *post* 266. Though the court may certify on a hypothetical case. (2 ib. 358. 1 Jac. & W. 426.) yet it must present a pure legal question, (6 Barn. and Cr. 421. 4 Ves. 790, 5 ib. 581.) The case is signed by counsel on both sides, vol. 1, p. 46, *ante*. 1 Jac. and W. 22.

CHAP. II.

tenements which were then held by him on leases for the lives of the persons in the said leases in that behalf named. As we are of this opinion, the interests of the other parties mentioned in the questions are equitable interests only, and we have not given any opinion as to them.(*a*)

Signed by the Judges.

Action at Law.

Action at law. See form of order directing an action at law and reference, in case of piracy of a copy-right, 2 Russ. 385. 402-5.

Form of judge's certificate of the trial of an action brought by order of the court of chancery. Bla. 52. app.

Though the construction of a covenant is the same in equity as at law, yet where a very nice question of construction arises, the court will send it for the opinion of a court of law. On a bill for specific performance of a covenant for perpetual renewal of a lease for years determinable on lives, the question of construction being one of great doubt and difficulty, the court, although of the opinion in pursuance with its construction of the covenant that the plaintiff had not complied with the condition on which the renewal depended, (not having applied for renewal till the death of the second life,) and that therefore the bill should be dismissed; yet, considering it a very nice question whether the covenant was limited to the dropping of the first life, the court gave leave to the plaintiff to retain the bill for twelve months, in order to enable him to take the opinion of a court of law by bringing an action for the breach of the covenant, or adopting any other course, as might be advised; and if no action be brought within that period, the bill must stand dismissed, but without costs; that the action must not be ejectment: subject, therefore, to these terms, the court decreed the bill dismissed.(*b*)

(*a*) When the argument was brought on, the court having intimated that they should decline certifying an opinion as to what would have been the effect of the will if certain equitable devises had been legal devises, and that a court of equity should so mould the case as to present it to a court of law as a simple legal question: the only question therefore discussed was, whether the trustees took the legal fee in the freehold estates. What estates the plaintiffs would have taken if the legal estates had not remained in the trustees, was not therefore discussed or certified. 6 Barn. & Cr. 421. Where the opinion of the court of K. B. on a case afforded a substantial answer to the questions proposed, although conflicting with that of C. P., the chancellor, concurring with the former, confirmed the certificate, with the view of helping the case in the House of Lords. 1 Turn. Ch. 25.

(*b*) Maxwell v. Ward, 13 Price 674. Depositions of wit. sick, &c. may be ordered to be read, 1 Ves. and B. 335, see *post.* § 55.

FEIGNED ISSUE.

CHAP. II.

§ 55.

Vol. I. p. 47-50 Feigned Issue when and how applied for and awarded. No 1. Notice of motion for feigned issue. No. 2. Affidavit of service. No 3. Decretal Order for *reference* to Master to ascertain the amount due on a land contract *and for feigned issue*, as to the fact of execution and delivery of a deed. Also, No. 4. Form of Order *for issue* to ascertain the marriage and identity of a party devisee and *for reference* to a Master to ascertain whether a devise was of the personal or real, the proportions of the trust estate belonging to each *cestuique trust* and to take an account of the trust. Form of an order for an *issue* (quantum damnificatus) for assessment of

Questions of fact arising on hearing, and which the court cannot safely decide on upon the evidence produced, are referred to a Master, or in peculiar cases sent to a jury, that their verdict may inform and satisfy the conscience of the court. But as no jury can be summoned to attend at this court, the fact is directed to be tried before one of the courts of common law upon a feigned issue. For in order to bring it there, and have the point in dispute, and that only put in issue, an action is feigned to be brought, wherein the pretended plaintiff declares that he laid a wager of $—, with the defendant, that A was heir at law to B, and then avers that he is so, and brings his action for the $—. The defendant admits the wager, but affirms that A is not heir at law to B, and thereupon that issue is joined which is directed out of chancery to be tried; and then the verdict of the jurors at law determines the fact in the court of equity This proceeding (*a*) is on motion of a party, and sometimes originates with the court itself. In the former case, a refusal would be deemed a ground of appeal, if the court appealed to should think the issue ought to have been tried. The regular time for applying for, or directing an issue is on the *hearing*, not on the coming in of the answer; sometimes, and in cases requiring it, the issue is *then* directed, and may in cases of divorce be applied for on usual notice, upon filing replication (*b*) (Vol. I. p. 316, *post* ch. 9. § 5) The court, in the order directing the issue will sometimes fix the question to be tried, direct by whom and in what mode the issue shall be made up, who are to be plaintiff and defendant, when and where the action shall be tried, and with a view to a thorough investigation, likewise direct that particular matters shall be produced or allowed in evidence, and that the plaintiff or defendant shall attend the trial and be examined. In England the court refers it to a Master to settle the form of the issue, (if the parties differ between themselves on the terms of it, but sometimes the court itself will fix the question to be tried,) and also directs who shall be plaintiff and defendant, time and place of trial, &c. But though referred to a Master to settle, if the parties differ on it, the issue is there usually drawn by a special pleader, or practising

(*a*) See note p. 269. (*b*) R. 167. 65.

CHAP. II.

law barrister, and approved by counsel, a copy of the draft delivered to the opposite solicitor, and if objections to the form arise, which counsel or the parties cannot settle between themselves, the Master must be attended; for which purpose a copy of the order of reference, and of the draft of the issue, are left in the Master's office by the party procuring it; the necessary warrants taken out, viz. 'on leaving the issue,' and 'to settle the issue,' &c., and acted upon in the usual manner. If, on attending the Master, or without attending him, any alteration is desired in the *order* (which embodies the question to be tried, which the Master cannot vary,) such alteration must be applied for on motion or petition; and, if any variation be made by a new order, that order is also left at the Master's, and the usual proceedings gone through for obtaining the Master's decision, whose report (or certificate) must be filed, but requires no confirmation. The issue thus settled by the Master is then made up. This, and all subsequent proceedings, are the same as

damages and compensation (the issue to be on non assumpsit.) 1 John. ch. 151. Blake 377 See form in Supr. Court. 2 Cow. 465. (See also English forms of decrees directing issues. 4 Price 87; 5 ib. 25; see 13 ibid 500. 510-11.)

No 5. Common form of an order for feigned issue in case of *adultery*. No 6 *Special form* in the above case, with directions that in making up the issue, the solicitor either specify the names with whom the adultery was committed, or deliver to defendant's solicitor, a bill of particulars of times and places, as to persons unknown; also, that complainant pay defendant certain allowance to procure attendance of her witnesses, and for counsel on trial of issue. No 7. *Special form* putting complainant to her *election* to abide by one of the two charges of *adultery*, and *cruel treatment* (misjoined), and if the former, then a feigned issue. No. 8. *Order* on petition of a party against whom a *Commission in the nature of lunacy had issued, to try the fact of habitual drunkenness.* No. 9. Decretal order (pursuant to a petition) *discharging* the order for a *feigned issue, directing a reference*, and a sale on non-payment of the sum admitted due No. 10. Order for taking the issue *pro confesso*, in favour of defendant on neglect of the plaintiff to prepare the same and bring it on to trial. *Feigned issue*, viz. No. 11. *Narr*, (see also Blake 380 3, see form in Supreme Court, 2 Cow. 467) No. 12. *Plea*, (see also Blake 383. 2 Cow. 469.) No. 13. *Circuit-roll* or *trial record—Preparations for trial:* No. 14. *Affidavit* in support of a petition to vary minutes of an order for trial of an issue, so that the same be tried by a special jury of merchants in a case of parnership. No. 15. *Order* on petition that the issue on the fact of *lunacy* be tried at another circuit, the judge not having been able to try the same at the circuit ordered. *Trial* and proceedings *after trial:* (see continuance on feigned issue in Supr. Court, 2 Cow. 470.) Postea (see form Blake 384, see form in Supr. Court, 2 Cow. 470.) *Certificate* of Judge, (form Blake 385,) see ib. appx. 52, in an action directed. Notice of hearing upon the equity reserved (on filing the *nisi prius* record. *postea, venire. minutes of trial* and *certificate* of the judge.) Blake 385. New Trial: No. 16. Order for new trial in case of adultery, setting forth the principles of the adjudication, (Germond v. Germond.) No. 17. Decree denying motion for a new trial on an issue of lunacy, and ordering a commission of lunacy to be suspended and discharged No. 18. Decree final after trial of feigned issue and verdict in favor of the validity of a will, and decreeing a perpetual injunction. (See in Supr. Court form of rule, 2 Cow. 471.) *Costs.*

if the cause were originally at common law, until the verdict; except only, that if a special jury be desired, it must be obtained on motion to the court.(a)

No. 1. Notice of Motion for Feigned Issue.

(See form of notices, § 14. *ante* p. 39, &c. 42, &c.) (Title of cause.) Sir: Take notice that upon the bill and answer in the above cause, I intend to move this court at the next term thereof, *or*, &c. (as in notice § 14.) for a feigned issue to try the facts *of* adultery (*or as the object of the* motion may be) charged in the complainant's said bill of complaint, and denied by the defendant in his said answer. Dated, &c. Your's, &c.

G. W. S., Solicitor for Complainant.

To E. W. K., Esq. Solicitor for Defendant.

No. 2. Affidavit of Service.

(See other forms § 7. 17. *ante* p. 24. 54.) Title as before. City and County of New-York, ss.—C. W., a clerk in the office of G. W. S., Esquire, Solicitor for

(a) 1 Grant 224. 2d ed. 1829. 1 Newl. 568. 3d ed. 1830. Harr. 508. c. see *post* 'Trial' under No. 15. 2 Madd. 475. 18 Ves. 481. 2 P. W. 68. further as to *Feigned Issue and the proceedings* (whether awarded in chancery or in the supreme court,) *ante* v. 1. p. 47, &c. 3 Black. C 452. Blake 373-388. 1 Johns. Dig 357. 360-1. 2 ib. 306. Also 5 J. Ch. 118. 137-9. 141. 148. 2 ib. 224 17 J. 267. 1 J. Cas. 25. 402. 1 Caines 487. 1 Wend. 18. 7 Cow. 494. 6 Cow. 55. 2 Cow. 465-471. 1 Paige 18. and 1 Hopk. 579. Where the testator had exercised acts of ownership, as receiving profits. redeeming the land tax &c., the court held on a bill by the devisee for a conveyance of the legal estate, upon the ground of an alleged equitable title, that it was a case proper for an issue, whether the testator was at the time of his death beneficially entitled, and decreed accordingly (3 Meriv. 466.) As to right of an heir at law defendant in a suit to establish a will, to have an issue of devisavit vel non. (See 13 Price 119, and as to costs, ib. 608. 619.) In an issue directed to try the validity of a will, a party objecting to be a party to the issue, and to being included in the order for production of books, &c. was at liberty to attend the trial by counsel, but ordered to produce the documents, except such as she possessed as mortgagee. (6 Madd. 48.) On a motion for a receiver, and an issue directed, the court ordered that the plaintiff and defendant should be examined on the trial (without consent): but the defendant afterwards declining to proceed on the issue, the court held that it had no power to compel him. (4 Madd. 236.) Where, upon conflicting affidavits at the hearing, an issue was directed, and both parties ordered to be examined, an application for a rehearing made after the trial had was refused with costs, and order confirmed upon appl. (1 Jac. 516.)

CHAP. II.

the complainant in the above cause, being duly sworn, deposeth and saith, that on the — day of —, he served on E. W. K., Esquire, in person, a notice of which the foregoing is a copy. (Signed.) Sworn, &c. (Jurat § 8. p. 33-5.)

No. 3. Order for Reference and Feigned Issue.

Reference to ascertain amount due on land contract, feigned issue as to the fact of the execution, &c. of a deed.

(Caption, &c. § 32 p. 78. Title: B. J. and S. J., v. J. P. and R. M., see this case. *Jewett v. Palmer*, 7 Johns. Ch. 65-68.) This cause having been brought to a hearing by consent upon the pleadings and proofs, and argued by Mr N. Williams, of counsel for the complainants, and by Messrs. Gold and Sill, of counsel for the defendants, and the pleadings and proofs being duly considered, It is ordered, adjudged and decreed, that it be referred to any one of the Masters of this court, residing in any county of this state, to ascertain and report the amount due to the complainants for principal and interest upon the contract entered into by them with the defendant, I. P., in October 1816, for the sale of one hundred and fifty-seven acres of land in the pleadings mentioned, at the rate of $10 an acre, and with interest, to be computed upon the balance remaining unpaid after the first day of February, 1817; and, It is hereby declared and adjudged, that the complainants have a valid and subsisting lien as of the first day of February, 1819, on the said land for $627 72, part of the balance of principal and interest remaining unpaid, and to be reported due as aforesaid, and for the interest on that sum from the period last aforesaid, inasmuch as the said sum of $627 72, was paid by the defendant, R. M., to the defendant, I. P., after notice of the claim aforesaid of the complainants, and of the pendency of this suit. And it is further ordered, adjudged and decreed, that a feigned issue be awarded to try the truth of the fact in issue between the parties, whether the deed in the pleadings and proofs mentioned to have been given by the defendant I. P., to the defendant R. M., for one hundred and seventeen acres, being part and parcel of the said one hundred and fifty-seven acres of land, purporting to bear date on the fifth day of March, 1819, was actually and truly executed and delivered on that day, or at some other and what subsequent day in the said month

of March, and that the feigned issue be made and settled according to the course and practice of the court, by the said counsel, and if they cannot agree as to the form and terms of it, that application be made to the court for directions, and that the said issue be tried at the next circuit court to be held in and for M—— county, unless the counsel shall mutually agree upon some other county, and that all other and further questions in this cause, and particularly whether the complainants have not a lien also upon the said lands for the residue of the purchase money due from the defendant P., be reserved until after the said issue shall have been taken, and the cause set down for final hearing thereon.

No. 4. Order for Issue and Reference.

Issue as to marriage and identity of devisee; *reference* as to what was devised, the portions to each *cestuique trust* and for an account of the trust.

(Caption, title and commencement, see § 32. p. 78.) In Chancery: N. F., C. K., and T. W. L., trustees, &c. vs. M. A. H., and others: This cause coming on to be heard before the Chancellor, thereupon, on reading the pleadings, and on motion of James Smith, solicitor for the complainants, it is ordered that a feigned issue be formed and tried in the ordinary manner, between the above parties, by a jury of the city and county of New-York, at a —— to be held in and for the said city and county, to inquire, ascertain, and determine whether J. A., in the pleadings mentioned at the time of his decease, left a wife, and who was his wife? Whether the said M A. H. is the same person described in the will of the said J. A., deceased, as his dearly beloved wife M. A. A.; and whether the said M. A. H. was deemed, received, or reputed to be the wife of the said J. A. And it is further ordered and decreed, and the Chancellor doth hereby order and decree, that it be referred to one of the Masters of this court to enquire whether the devise in the complainant's bill set forth as a devise by H W. to M. H., one of the above defendants of a part of the trust estate in the said bill mentioned, was a devise of real or personal estate, and whether the part of the trust estate so devised to the said M. H., was the personal estate of the said H. W., or whether it was real estate, and as such descends to the next heirs of the blood of M. W., deceased; and that the said Master report in whom the said estate now

CHAP. II.

legally vests. And it is further ordered, that the said Master ascertain what proportions of the said trust estate belong to each of the respective cestui que trusts in the said bill mentioned; and also that the said Master take and state an account of all monies that have been received under the said trust deeds, and of the distribution thereof among the several defendants; and that the said Master report to this court the balance which, on said account, shall be found due to each respective defendant, after making all just allowances for expenditures and compensation for the agency and services rendered in the execution of the said trust; and further, that the said Master report what will be a due and just compensation or commission for the future agency of the said trust estate; and that the said Master have power to examine witnesses under oath, touching the matters above mentioned, or any of them, and to compel the production of all books and papers he may deem necessary in taking such account, and that all further directions be reserved until the coming in of the said report.

No. 5. *Common form of Order for Feigned Issue in case of Adultery.*

Common form of order, &c. See also Bla. 379. See *ante* vol. 1. p. 316.

(Caption, title, commencement, § 32. p. 78, &c.) This cause coming on to be heard before the Chancellor, thereupon, on reading the pleadings, and on motion of H. V. solicitor of or of counsel for complainant, it is ordered that a feigned issue be formed and tried in the ordinary manner between the above parties, by a jury of the county of C—., to inquire, ascertain and determine, whether the adultery complained of in the complainant's bill of complaint, hath been committed by the defendant: and that all farther directions be reserved until after the determination of the said issue: *or*, it is ordered that a feigned issue be formed and tried in the Superior Court of the city of New-York, in the ordinary manner, between the above parties, by a jury of the city and county of New-York, to enquire, &c.: *or*, (in case no notice of motion, but where the court order an issue:) This cause coming on to be heard before the Chancellor; thereupon, on reading the pleadings and on motion of, &c., it is ordered, &c. (see p. 79, &c., 84, &c.)

No. 6. *Special Form of Order for Feigned Issue in Case of Adultery.*

See marginal note as to this form, p. 286.

[Caption, Title and Commencement, § 32 p. 78, &c.] This cause having been put at issue on the answer of the defendant denying the adultery charged in the complainant's bill, on reading and filing the petition of the complainant, and on motion of William Hay, junior, his Solicitor, and on hearing counsel thereon, it is ordered, that a feigned issue be formed and tried in the ordinary manner by a jury of the county of W. before one of the justices of the supreme court, or a circuit judge,(*a*) to inquire, ascertain and determine, whether the adultery charged in the complainant's bill hath been committed by the defendant; and that the Solicitor for the complainant make up the said issue, and serve a copy thereof on the defendant's Solicitor, without delay; and that in making up the said issue, the Solicitor either specify the names of all the persons with whom the adultery charged is alleged to have been committed, or that he deliver to the defendant's Solicitor therewith a bill of particulars, stating the particular places, and at or about what time or times the alleged adultery with persons unknown (*b*) to the complainant is supposed to have been committed; and all further directions are reserved until the determination of the said issue.

And on reading and filing the petition of the defendant, and on motion of W. L. Warren, Esquire, in behalf of Daniel Cady, Esquire, Solicitor for the defendant, and on hearing counsel thereon, it is ordered, that *eighty* dollars be allowed to the defendant, for the purpose of procuring the attendance of her witnesses, and for the payment of counsel on the trial of the said issue,

(*a*) 2 R. S. 203-4.

(*b*) The name of the individual with whom the adultery was committed should be stated in the bill, or in the answer if set up in defence. If not known, this fact should be averred, and time, place and circumstances stated in the pleadings and issue If the charge is not sufficiently explicit, the objection may be made when a feigned issue is applied for, and the court will then see that it be so framed that neither party take any advantage of the other at the trial. The necessity of this precaution is fully illustrated in the history of the case of Germond and Germond. 6 J. Ch. 347. (*post* No. 16.) See 2 Paige 109. 112. 1 Paige 83.

CHAP. II.

to be paid by the complainant; and that the complainant pay to the defendant, or her Solicitor, *thirty* dollars of that sum, on demand, and the residue at any time when the same may be demanded of him or his Solicitor after the *twenty-fifth* day of *November* instant.

No. 7. *Special Form putting Complainant to her Election.*

Alternative order for feigned issue, on complainant electing to abide by one of two charges of adultery and cruelty misjoined. See this case Johnson v. Johnson, 6 Johns. Ch. 163-6.

[Caption, &c. § 32. p. 78.] This cause having been submitted as to the question whether the charges of adultery and of cruel and inhuman treatment in the the complainant's bill could be united in the same bill, and whether the complainant should be put to her election to rest upon one of the charges only; and the said submission being made in writing by Mr. R. Bogardus, Sol'r for the complainant, and by Mr. E. W. King, Solicitor for the defendant, and duly considered: It is ordered, &c. that the complainant, within eight days after service of a copy of this decretal order upon her Solicitor, elect which of the aforesaid charges she will abide by in this suit; and if she shall elect to abide by the charge of adultery, that then a feigned issue be duly made up, settled and awarded to try the truth of the charge.

No. 8. *Order for Issue to try the Fact of habitual Drunkenness.*

See marginal note, p. 268.

(Caption, title, &c. § 32. p. 78. In the matter of —, an habitual drunkard.) On reading, &c. the petition of ——, verified by his oath, and bearing date the first day of October instant, and on hearing Mr. V. D. of counsel for the petitioner, It is ordered that an issue be made up and settled to try the question, whether the said —, by reason of habitual drunkenness, be incapable of managing his own affairs within the meaning of the revised statutes, relating to habitual drunkards: that the said issue be tried at the next circuit court, to be held in and for the county of ——, that the counsel for the said ——, in the first instance prepare the issue and submit it to the counsel or agent of the overseers of the poor of the town of ——, on whose petition the commission issued; and that if the parties cannot agree on the form of the issue, that application be made to this

court for further directions; that if the counsel for the said ——, shall omit to prepare and serve on the opposite party as aforesaid, such an issue in six weeks after service of a copy of this order, that then the order for an issue shall be deemed discharged.

No. 9. *Decretal Order discharging the Order for Feigned Issue, and directing a Reference, &c.*

(Caption, &c. § 32. p. 78. Title as in No. 3. Jewett v. Palmer.) On reading and filing the petition of the complainants, in which they waive the benefit of the feigned issue awarded in this cause, on the 8th day of February last, and the extension of the lien claimed by the complainants upon the lands in the pleadings mentioned, beyond the extent allowed by the decretal order awarding the said issue, and in which petition they pray that the residue of the purchase money to be reported due by the Master, after deducting the payments, and the sum of $627 72, which is declared by the said decretal order to be a lien upon the lands aforesaid may be directed to be paid by the defendant I. P., and that the said lands may be sold to pay the said sum of $627 72, with the interest and costs, if the same be not paid within a reasonable time, and on motion of Mr. N. Williams, Solicitor, and of counsel for the complainants, (Messrs. Gold and Sill appearing for the defendant R. M., and acquiescing in the proposed modification of the said decretal order, so far as that the said lands should be held free from any lien of the complainants on payment of the said sum of $627 72, and resisting the claim for costs, and praying costs against the complainants.) It is ordered, adjudged and decreed, and the chancellor doth, &c., that the order for the feigned issue in this cause be discharged; and it is further ordered, adjudged and decreed, that it be referred to any one of the Masters of this court, to ascertain and report the amount, or balance, of principal and interest due from the defendant I. P., to the complainants, and that the defendant R. M., pay to the complainants, within forty days after notice of this decree, $627 72, part of the balance appearing by the pleadings to be due from the said defendant, I. P., together with the interest on $100 of the said $627 72, from the 20th day of March, 1819, and on

Marginal note as to this form, p. 268. see the former order, No. 3, and the original case, 7 Johns. Ch. 65.

CHAP. II.

$527 72, the residue thereof, from the first day of Oct. 1820, and on default thereof, that the lands in the pleadings mentioned as having been sold by the defendant, I. P. to the defendant R. M. in March, 1819, be sold by any one of the Masters of this court, on giving due public notice, (see v. 1. p. 117, 212-13,) of six weeks, at the court-house door of the county where the lands lie, and also in a newspaper printed in the county where the lands lie, (if any, and if not, then in a newspaper printed in an adjoining county,) of the time and place of sale, and that he sell so much of the premises as shall be requisite to raise the said sums, with interest as aforesaid, together with the taxable costs of such notice and sale, and pay the same after deducting his costs to the Solicitor for the complainants, and that he execute a deed to the purchaser, and make report to this court of his proceedings under this order; and it is further ordered, adjudged and decreed, that if the defendant R M., shall make payment as aforesaid, within the said forty days, that no costs of this suit, as between him and the complainants, be charged by either of them against the other, and that the lands so sold to him as aforesaid, on such payment being made, be deemed and *held* discharged of any further claim or lien of the complainants, by reason of the matters in the pleadings charged; and it is further ordered, adjudged and decreed, that the balance of principal and interest to be reported due to the complainants from the defendant, I. P., after deducting the said $627 72, with interest thereon as aforesaid, be paid by the said I. P., within thirty days after the report shall have been made and confirmed, together with the complainant's costs of this suit to be taxed, or in default thereof, that the complainants have execution therefor against the said I. P. according to the course and practice of the court.

No. 10. *Order for Taking the Issue as Confessed.*

Taking the issue pro confesso against plaintiff for not proceeding to trial.

[Caption, title and commencement as in § 32. p. 78, &c.] It appearing that by an order made in this cause, bearing date, &c. it was ordered that the parties should proceed to a trial at law, at the next, &c. to be holden for, &c. on the following issue, viz.: Whether, &c.; and the complainants in this court were to be plaintiffs

at law, and the defendants in this court were to be defendants at law, who were forthwith to name an attorney, accept a declaration, appear and plead to issue; and it was ordered that it should be referred to Mr. ——, one of the Masters of this court, to settle the issue, in case the parties differed; and the chancellor reserved the consideration of all further directions, and of the costs of this suit, other than as therein mentioned, until after the trial of the said issue; and any of the parties were to be at liberty to apply to this court, as there should be occasion. And it appearing by the affidavit of —— solicitor for the above named defendants, that the plaintiffs have not proceeded to the trial of the said issue, as directed by the said order; nor have they drawn up the order, or taken any other step therein: it was therefore prayed (*or* moved) that the issue directed by the said order to be tried at the last (circuit, &c.) might be taken pro confesso against the plaintiffs; wherefore, and upon hearing the said order, the said affidavit and an affidavit of notice of this motion read, and what was alleged by the counsel for the said defendants. It is ordered, that the issue directed by the said order to be tried between the parties therein named be taken as if tried, and a verdict found for the defendants.(*a*)

No. 11. *Narr.*

In the Superior Court of the City of New York, } *Of June term, in the year of our Lord one thousand eight hundred and twenty nine.*

City and County of New York, ss.: John Doe, (by G. W. S. his attorney) complains of Richard Roe being in custody, &c. For that whereas, heretofore, to wit, on

1st count, charging the adultery with A. B. in the town of, &c. county of, &c. on, &c.

(*a*) 2 Grant 227. Where the plaintiff in the issue does not proceed to a trial at the time directed by the court, the court will order him to do it in four days, or the issue be taken as tried, and a verdict for the defendant, or if the proper party will not draw up the order, the court will, on proof of refusal, order the matter directed to be put in issue to be taken *pro confesso*, and the cause may be set down for further directions, and to have the issue taken *pro confesso*. [1 Grant 225. 1 Newl. 573. 3d ed. 1830. see v. 1. p 49.] If the plaintiff give a notice of trial, and countermand it, but not in time, the court will, on motion, give costs, and not put the defendant to move the court of law. Harr. Grant, ib.

CHAP. II.

the first day of June, in the year of our Lord one thousand eight hundred and twenty-nine,(*a*) at the city of New York, and in the county of New York, a certain discourse was moved and had by and between the said John Doe and the said Richard Roe of and concerning one E. S. of the town of ——, in the county of ——, yeoman, and F. S. his wife, and of and concerning a certain suit or action then depending in the Court of Chancery of the State of New York, by the said F. S. the complainant, against the said E. S. defendant, and upon that discourse a question then and there arose and was debated between the said John Doe and the said Richard Roe, whether the said E. S. the husband of the said F. S. had ever committed adultery after his intermarriage with her the said F. S and before the thirty-first day of January in the year of our Lord one thousand eight hundred and twenty-nine, or not; and the said John Doe then and there asserted and affirmed that the said E. S after his intermarriage with the said F. S. and before the said thirty-first day of January, in the year of our Lord one thousand eight hundred and twenty-nine, that is to say, on the first day of January in the year of our Lord one thousand eight hundred and twenty-eight, had committed adultery, that is to say, with one A. B. to wit. in the said town of ——, in the county of ——, *that is to say, at the city of New York, and in the county of New York aforesaid*,(*b*) which said assertion and affirmation of the said John Doe the said Richard Roe then and there wholly denied and asserted to the contrary thereof, and afterwards, to wit, on the same day and year first above mentioned, at the city of New York, and in the county of New York aforesaid, in consideration that the said John Doe, at the special instance and request of the said Richard Roe, had then and there paid to the said Richard Roe the sum of fifty dollars lawful money of the United States of America, he the said Richard Roe then and there undertook and to the said John Doe then and there faithfully promised to pay him, the said John Doe, the sum of one

(*a*) Or some other day prior to the term stated in the caption, 3 J. 42. 10 J. 119. 4 J. 450.

(*b*) The superior court being local. But query? if necessary

hundred dollars like lawful money as aforesaid, in case he, the said E. S. had committed adultery as aforesaid, after his intermarriage with the said F. S. and before the said thirty-first day of January, in the year of our Lord one thousand eight hundred and twenty-nine aforesaid, with the said A. B.: And the said John Doe in fact saith, that the said E. S. after his intermarriage with the said F. S. and before the said thirty-first day of January, in the year of our Lord one thousand eight hundred and twenty-nine, to wit, on the first day of January, in the year one thousand eight hundred and twenty-eight, did commit adultery, that is to say, with the said A. B. to wit, at the said town of ——, in the said county of ——; (that is to say, at the city of New York, and in the county of New York aforesaid,) whereof the said Richard Roe afterwards, to wit, on the second day of June, in the year of our Lord one thousand eight hundred and twenty-nine, at the city of New-York, and in the county of New-York aforesaid, had notice, by reason whereof the said Richard Roe then and there became liable to pay to the said John Doe, the said sum of one hundred dollars whenever he the said Richard Roe should be thereunto afterwards requested; and being so liable, he, the said Richard Roe, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at the city of New York, and in the county of New York aforesaid, undertook, and to the said John Doe then and there faithfully promise to pay him the said sum of one hundred dollars when he the said Richard Roe should be thereunto afterwards requested. Nevertheless, the said Richard Roe, not regarding his said promise and undertaking by him in form aforesaid made, hath not yet paid to the said John Doe the said sum of one hundred dollars, or any part thereof, although so to do the said Richard Roe was requested by the said John Doe afterwards, to wit, on the said second day of June, in the year last aforesaid, and often since, to wit, at the city of New York, and in the county of New York aforesaid, but to pay the same to the said John Doe, he the said Richard Roe hath hitherto wholly neglected and refused, and still doth neglect and refuse. And also, for that whereas heretofore, to wit, on, &c. at, &c. (*as in first count,*) a cer-

2d count, charging adultery with another person at another place.

CHAP. II.

tain other discourse, &c. of and concerning a certain other suit, &c. and the said John Doe then and there asserted and affirmed, that the said E. S. &c. had committed adultery with one C. D. otherwise sometimes called C.E. and at other times called C.F. that is to say, at the city, &c. and afterwards, &c. to wit, on, &c. in consideration, &c. faithfully promised to pay, &c. in case he the said E. S. had committed adultery as last aforesaid, &c. with the said C. D. otherwise called, &c. And the said John Doe in fact saith, that the said E. S. after, &c. did commit adultery with the said C. D. otherwise sometimes called, &c. By reason of which last mentioned premises, &c. And being so liable as last aforesaid, &c. promised to pay him the last mentioned sum, &c. Nevertheless, &c. and not regarding his said promise, &c. last aforesaid made, &c. hath not paid, &c. the last mentioned sum, &c. (to the end of the first count.)

3d count, charging adultery with another person at the place mentioned in the 1st count.

And also for that, whereas heretofore, to wit, on the said first day of June, &c. at the city, &c. aforesaid, a certain other discourse, &c. (as before.) And the said John Doe then and there asserted and affirmed, that the said E. S. after his intermarriage with the said F. S. and before the said thirty-first, &c. that is to say, on the first, &c. had committed adultery with one E. S. to wit, at the said town of ——, in the county of ——, (that is to say, at the city of N. Y. and in the county of N. Y. aforesaid,) which said assertion, &c. (as before.)

4th count, charging adultery with another person of the same place as in last count.

And also for that whereas, &c. a certain other discourse, &c. at, &c. (as before,) and the said John Doe, then and there asserted and affirmed, that the said E. S. after his intermarriage with the said F. S and before the said thirty-first, &c. that is to say, on the first, &c. had committed adultery with one G. H. to wit, at the said town of ——, in the county of ——, that is to say, at the city of, &c. aforesaid, which said assertion and affirmation of the said John Doe, the said Richard Roe then and there wholly denied, &c. (as in first count.)

5th count, charging adultery with persons unknown, see Germond v. Germond, 6. Johns, ch. 347

And also, for that whereas heretofore, to wit, on the said (1 June, 1829,) at the city, &c. and in the county, &c. aforesaid, a certain other discourse was moved and had by and between the said John Doe and the said Richard Roe, of and concerning the said E. S. and the said F. S.

his wife, and of and concerning a certain other suit or action then depending in the said court of chancery by the said F. S. complainant, against the said E. S. defendant, and upon the said last mentioned discourse a question then and there arose and was debated between the said John Doe and the said Richard Roe, whether the said E. S. the husband of the said F. S. had ever committed adultery after his intermarriage with her the said F. S. and before the thirty-first (January, 1829,) or not, and the said John Doe then and there asserted and affirmed, that the said E. S. after his intermarriage with the said F. S. and before the said thirty-first, &c. (January, 1829,) that is to say, on the first, &c. (January, 1828,) had committed adultery with a certain woman, or with certain women, to the said F. S. unknown, to wit, at the city of N. Y. and in the county of N. Y. aforesaid, which said assertion and affirmation of the said John Doe, the said Richard Roe then and there wholly denied and asserted to the contrary thereof, and afterwards, to wit, on the same day and year first above mentioned, at the city of N. Y. and in the county of N. Y. aforesaid, in consideration that the said John Doe at the special instance and request of the said Richard Roe had then and there paid to the said Richard Roe the sum of fifty dollars lawful money of the United States of America, he the said Richard Roe then and there undertook, and to the said John Doe then and there faithfully promised to pay to him the said John Doe, the further sum of one hundred dollars like lawful money as aforesaid, in case he, the said E. S. had committed adultery as last aforesaid, after his intermarriage with the said F. S. and before the said thirty-first, &c. with a certain woman, or with certain women, to the said F. S. unknown, as aforesaid. And the said John Doe, in fact saith, that the said E. S. after his intermarriage with the said F. S. and before the said thirty-first, &c. to wit, on(a) the first, &c. (Jan. 1828,) did commit adultery with a certain woman, or with certain women to the said F. S. unknown, to wit, at the city of N. Y. and in the county of N. Y. aforesaid, whereof the said Richard Roe, afterwards, to wit, on the second day of June, in the year of our Lord, (1829,) at the city of N. Y. and in the county of N. Y. aforesaid, had notice; by reason of which last

CHAP. II.

and 2d Paige 112, & order *ante* No. 6. notes, p. 273.

(a) As to the particularity of the charge, see p. 273.

CHAP. II.

mentioned premises, the said Richard Roe then and there became liable to pay to the said John Doe the said last mentioned sum of one hundred dollars whenever he, the said Richard Roe, should be thereunto afterwards requested, and being so liable as last aforesaid he the said Richard Roe, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at the city of N. Y. and in the county of N. Y. aforesaid, undertook, and to the said John Doe then and there faithfully promised to pay him the said last mentioned sum of one hundred dollars, when he, the said Richard Roe should be thereunto afterwards requested. Nevertheless, the said Richard Roe, not regarding his said promise and undertaking, by him in form last aforesaid made, hath not yet paid to the said John Doe the said last mentioned sum of one hundred dollars, or any part thereof, although so to do the said Richard Roe was requested by the said John Doe afterwards, to wit, on the said second day of June, in the year of our Lord one thousand eight hundred and twenty-nine, and often since, to wit, at the city of New York, and in the county of New York aforesaid, but to pay the same to the said John Doe, he, the said Richard Roe hath hitherto wholly neglected and refused, and still doth neglect and refuse. All which is to the damage of the said John Doe of five hundred dollars, and thereof he brings suit, &c.

Pledges to prosecute. } John Doe and Richard Fen.(a) } G. W. S. Attorney for Plaintiff.

City and County of New York, ss.—John Doe puts in his place G. W. S. his attorney, against Richard Roe, in a plea of trespass on the case.(b)

No. 12. *Plea.*

In the Superior Court of the City of New York,

Richard Roe ads. John Doe.

And the said Richard Roe, by E. W. K. his attorney,

(a) Pledges are unnecessary. 4 J. 190.

(b) This warrant is now unnecessary. The attorney's name must be stated in the Narr, and that of defendant's attorney in the plea. 2 R. S. 351. § 36.

comes and defends the wrong and injury, when, &c. and says that the said John Doe ought not to have or maintain his aforesaid action thereof against him, because he says, that though true it is that the said several discourses, in the foregoing declaration mentioned, were had and moved by and between the said John Doe and him, the said Richard Roe, wherein the question did arise as in the several counts of the foregoing declaration is respectively mentioned, and that he, the said Richard Roe, did undertake and promise in manner and form as the said John Doe hath above in that behalf alleged, Nevertheless, for plea in this behalf, the said Richard Roe saith, that the said E. S. the husband of the said F. S. did not commit adultery, after his intermarriage with her the said F. S. and before the said twenty-first day of January, in the year of our Lord one thousand eight hundred and twenty-nine, as the said John Doe hath above in that behalf alleged, and of this the said Richard Roe puts himself upon the country, and the said John Doe doth the like, &c.

City and County of New-York, ss.: *Richard Roe puts in his place, &c.* (Warrant unnecessary. See note to last form.)

No. 13. *Circuit Roll, or Trial Record.*

If the issue be sent to the Supreme Court for trial, it must be tried at a circuit, or sittings of the court in the proper county, unless the supreme court shall, on motion of either party, in cases of great difficulty, or which require great examination, order the trial to be had at the bar of the court.(*a*) The record for the trial at the circuit or sittings is denominated a *circuit-roll;* in the superior court of the city of New-York, a *trial record;* in the common pleas and mayor's court, an issue-roll or trial record.(*b*) The circuit-roll, in this case, consists simply (with the exception of a placita, of the term of joining issue, and memorandum perhaps,) of a transcript of the narr. and plea, with an entry that the issue joined is ordered by the court to be tried at the circuit court or sittings at which the same is triable. No warrants of

See formal parts of the roll. 1 Paine and Duer's Pr. 452-455. Bla. 384-4. 2 Cow. 467.

(*a*) 2 R. S. 409. § 1, 2.
(*b*) See rule 43 of the common pleas of the city and county of New-York.

CHAP. II.

attorney (the attorneys' names being entered in the narr. and plea,) award of venire (the venire except for a foreign jury being abolished,) continuancies, or nisi prius clause are necessary.(a) In the superior court of the city of New-York, the trial record is similar in form to that required by law for records of judgments in the common pleas,(b) consequently after the placita, of the term of the supposed return of process in this case, viz. 'Pleas in the Superior court of the city of New-York, held at the City-Hall, in and for the city of New-York, before the chief justice and associate justices of the same court, on the *first Monday of June*, of the term of June in the year, &c. Witness Samuel Jones, chief justice, Charles A. Clinton, Clerk.' Then follow the narr and plea, and if the issue be not tried at the next term after the joining thereof, the cause is continued by a *brief entry:* that the process between the parties is continued before the same court, until the term when such issue shall be tried.(c) No venire is now issued except for a foreign jury in the common pleas,(d) but in this respect, it seems the practice of the superior court remains unaltered, and no entry as in the circuit-roll of an order to try cause is provided. If therefore an award of venire should precede the entry of continuance, it would be thus: 'Therefore to try the issue above joined let a jury thereupon come in this same superior court of the city of New-York, before the aforesaid justices thereof, at the City-Hall, in the city of New-York, on the first Monday of July next, twelve, &c., each of whom, &c., by whom, &c., who neither, &c., to recognise, &c., because as well, &c., the same day is given to the parties there, &c.' If not then tried, and the court of chancery authorise the issue to be tried at any subsequent term, then the brief entry continuing the suit may be as follows: 'And hereupon the process thereof is continued between the parties aforesaid, before this same superior court of the city of New-York, until the first Monday of August, in the year,' &c. (Then follows the postea, after trial:) At which day, to wit, on &c.,

(a) 2 R. S. 410. 351, see 1 Paine and Duer's Pr 450.

(b) R. 39 of Superior Court. 2 R. S. 210. see 1 ib. 97. 106. act of 31st March, 1828, organizing the court, and act of Feb. 8, 1830, 53d sess. ch. 24, authorising a declaration without process, &c.

(c) 2 R. S. 210-11.

(d) Ib. 410.

at the superior court of the city of New-York, held at the City-Hall of, &c., before the justices of the same court, come the parties by their attorneys aforesaid, and the jurors of the jury whereof mention is above made, being summoned, also come, who to speak the truth of the matters within contained, being chosen, tried and sworn, say upon their oaths, &c.

No. 14. *Affidavit to vary the Order so that Trial be by Special Jury of Merchants.*

(Title, &c. § 7. p. 24, &c. A. B. of, &c. one of the above-named complainants, on behalf of himself and the others of the said complainants, maketh oath, that the above cause came on to be heard in this court in — term last, when an issue at law was directed by this court to be tried at the then next —, to be holden for the county of M—, "whether," &c. (*here set out the issue directed to be tried,*) as this deponent hath been informed and believes. And this deponent saith, that he apprehends, and humbly conceives and submits the same to the judgment of this court, that the said issue is more proper to be tried before a jury of merchants in the city of —, as being persons in trade, and conversant with the subject matter thereof, as being well acquainted with the nature of partnerships therein mentioned, than by a jury in the county of —, they being persons residing in the county, out of, and unconnected and unacquainted with trade and partnerships. And this deponent further saith, that the subject matter of the above cause, and of the said issue at law directed to be tried therein as aforesaid, did not arise in the said county of M—. And this deponent saith, that he apprehends and believes that the witnesses which will be produced by him, this deponent, and the said other complainants, and the said defendant B. A., at the trial of the said issue at law, reside at a great distance from the town of M—. (Signed A. B. sworn, &c.(*a*)

(*a*) 2 Grant 30, 2d. ed. 1829. Application in England is to vary the minutes of the order or decree directing the trial. *See* also 2 Young and Jervis 241. But see *post* No. 15. In Eng. on issue to try the validity of madnesss if complainant wishes it tried in a different county than where the land lies, the application must be by petition. 1 Sim. and Stu. 336.

No. 15. *Order for Trial at another Circuit, the Judge not having been able to try the Cause.*

(Caption, § 32. p. 78. Title 'In the matter of D. F. alleged to be a lunatic.' See this case, 4 Johns. Ch. 169, Matter of Folger.) On filing the petition of A. F. a committee of the estate of said lunatic, stating that the issue heretofore awarded to be tried in the above matter on the point of the lunacy of said Daniel, at the last W. county circuit, was not brought to trial, and that the judge who held the circuit declined trying the same, in consequence of the pressure of other business at said circuit, and on motion of Mr. L. M., Solicitor and counsel for the committee, it is ordered, that the said issue which was prepared for the said W. circuit, be brought to trial at the next circuit court, to be held in the county of R. by the Solicitor of said D., and that in default thereof, the rules heretofore made awarding the said issue to be tried, be discharged. It is further ordered, that a certified copy of this order be forthwith served on H. B., Esquire, Solicitor and counsel for said D (*g*)

Tiffl. v. 1, p. 49.

The court will have directed, [p. 267-9.] in cases requiring it, the particular matters to be produced or allowed in evidence, as that defendant's answer be received ;(*a*) and has power over every party interested in the question to be tried, to compel production of books, papers, &c. necessary for a complete trial, whether such party decline being a party to the issue or not. A co-defendant, therefore, interested under a will, thus declining, on issue to try its validity, may attend trial, but is included in the usual orders for production.(*b*) We have seen [p. 269. n. *a*.] that the complainant or defendant may be ordered to attend and be examined.(*c*) The decree

(*g*) In England the court will postpone the trial to a future assizes, where a party would otherwise be deprived of the attendance of his counsel. 1 Jac. and Walk. 227. A party cannot have the order to stay trial until he has obtained the common injunction, and upon affidavit that he cannot safely go to trial without the defendant's answer, and that the discovery expected to be obtained from it is likely to be useful to his defence. 2 Jac. and W. 388.

(*a*) 2 Ves. 40. Cited 1 Newl. Pr. 570. 3d ed. 1830; but see *ante* vol. 1 p. 48 n. (2).

(*b*) Ib. 6 Mad. 42.

(*c*) But liberty for each party to examine the other, cannot be ordered unless by consent. No objection is waived by the order

also generally directs, or an order may be obtained, that the depositions of party's witnesses, who may be dead, at the trial of the issue (or action directed) or who from ill health cannot attend, shall be read,(*d*) but the inability of the witness to attend, must, on applying for such order, be proved by affidavit.(*e*) The order for reading the depositions is necessary, not to render them evidence, but to save expense of *proving* the bill and answer, and other proceedings; the deposition of a deceased witness in a suit in chancery is evidence at law, after preliminary proof of the bill, answer, and issue joined: the order is an authority to the judge to receive the evidence, without that introductory matter.(*f*) And if a deposition *de bene esse* (any irregularity in taking which might have been effectually objected to before hearing) be read at the hearing, it is of course to order it to be read at the trial; and such order (it has been held in England) will not be discharged on the ground of the irregularity, though the party complaining did not know it till after the hearing, and though the time was very short between the publishing the deposition, and the hearing of the cause; as the party might have applied for time, to examine whether the depositions published had been regularly taken.(*g*) On trial of the issue *devisavit vel non*, directed by the court, *all* the witnesses to the will must be examined; they are not the witnesses of the one party nor the other, but the witnesses of the court; the issue is also part of the proceedings, and is so considered on a motion for a new trial.(*h*) Where upon an issue out of chancery in England, the jury could not agree, and the parties would not consent to discharge them, as the verdict was only to inform the conscience of the chancellor, and he might send it down again for trial; or as in the case of eleven agreeing, and the other juryman refusing to assign any reason for not concurring, he might be satisfied without a formal verdict, the judge took upon himself the responsibility of discharging them.(*i*)

except that which arises from his being a party in the cause. 1 New. 570. ed. 1830, citing 1 Ves. & B. 374 1 Swanst. 39. But see *ante*.

(*d*) 15 Ves. 176. 1 Ves. & B. 339. n.1 New. Pr. 570 1. ib.

(*e*) 1 Ves. & B. 335. c. ib.

(*f*) 1 Swanst. 170. c. ib.

(*g*) 1 Swanst. 166. 171. c. ib.

(*h*) Coop. 136. cited 1 Newl. Pr. 572. ed. 1830.

(*i*) 3 Carr. & P. 447.

CHAP. II.

New trial, when and how. See v. 1. p. 49-50.

The object of the trial is to satisfy this court, and until this court is satisfied, new trials will be granted. A case of this kind has been three times tried; the third trial having been granted from some discovered irregularity in obtaining the jury, and then a struck jury was ordered.(a) That being the object, the rules of law governing new trials do not prevail strictly in this court. Therefore, though if the verdict be contrary to the weight of evidence, or the judge misdirect the jury,(b) the court will, as a general rule, grant a new trial; yet the rejection of evidence which was admissible, or *vice versa*, is not a ground for a new trial where the court is satisfied that if it had been received, the verdict ought not to have been different. Nor that the judge incorrectly represented to the jury the effect of the answer, where the counsel at *nisi prius* did not at the trial suggest to the judge that such was not the effect.(c) But where new and material evidence is produced which was not before the jury at the first trial, the court will grant a new trial though the judge certify that he is satisfied with the verdict, and though the court of law would not have granted a new trial.(d) Not, however, if the new evidence has been kept back on purpose, by the party applying.(e) And it has been held, not a sufficient ground for a new trial, that the party applying was not apprised of a particular point of evidence, as if there is notice before trial to him, that a particular

(a) Case of Germond v. Germond, 6 Johns. Ch. 347. see *post* No. 16. and history of that case, 2 Paige 112. 1 Paige 83.

(b) Amb. 210, cited 1 Newl. 575. 3d ed. 1830.

(c) 2 Russ. 76. Barker v. Ray, see as to the same point, viz. that if the court think on looking at the report, and also the record of the suit in equity, that justice on the whole has been done; or that the question has been so dealt with, that if the evidence rejected had been received, or that received had been rejected and a different verdict given, it would not have been satisfactory, this court will not grant a new trial. 3 Swans. 345. 3 Ves. and B. 41. 11 Ves. 52-53. 9 Ves. 155. cited 1 Newl. 576. 3d ed.

(d) 2 Ves. 552, cited ib. But it seems that a new trial might not be granted to enable a party to obtain cumulative testimony, or to contradict the positive answer of defendant and the evidence of a witness in support of it. 2 Paige 24.

(e) 1 Ves. jr. 133. ib. A similar principle applies to other proceedings. Hence, if objections be not stated to a master, but purposely kept back, the rule for confirming his report will not be vacated to admit exceptions. 7 Johns. Ch. 137

person is abroad, but it does not point out the particular place of his residence; this is sufficient evidence to the party to prepare to encounter the evidence.(a)

In England, applications for new trials are supported by statements of attending counsel or affidavits, and inspection of the judges' notes(b). But here [as noticed vol. 1. p. 50.] if for any erroneous decision, misdirection, or verdict against evidence, *a case* must be made and settled *in the manner*(c) *prescribed* by the rules of the supreme court. Accordingly, the moving party, within four days after the trial, *as limited* by a rule of that court(d) prepares and serves a copy of the case; the opposite party, within four days after prepares and serves amendments; the former in four days after serves on the latter a notice to appear within a convenient time specified (not less than four, nor more than twenty days after service of such notice) before the judge who tried the cause to have the case and amendments settled. The judge will thereupon correct and settle the case as he may deem consistent with the truth of the facts.(e) When settled, either by lapse of

(a) 2 Atk. 318. 319. c. 1 Newl. Pr. 576. 3d ed.

(b) In motions for new trials the court of equity acts upon the statements of counsel attending the trial, without requiring affidavits, and do not call for the judges' notes until it is satisfied that there are reasonable grounds for the motion, 6 Mad. 58. But the judges' notes are obtained for the purpose of a new trial only, and the court cannot receive them *as evidence* of facts that transpired at the trial: they must be brought before it by affidavit, 6 Mad. 113. see form *post* No. 18. The party must first on an *ex-parte* application, satisfy the court that there is reasonable ground for sending to the judge who tried the issue, for his notes of the trial, 3 Rus. 318

(c) R. 140. Chy.

(d) R. 34 supreme court. But it seems from the language of R. 140. in *chancery* that a party may not be confined to the *time limited* by the rules of the supreme court. The present rules of that court (see next note) give no power to a judge to enlarge the time as formerly under Rule vi. of 1799. 7 Cow. 467. 9 J. 264. Application must be to the court. And in the present instance, perhaps to the court of chancery if time be necessary.

(e) Rule 34. supreme court. By rule 35 of that court [but see last note] if the party omit to make a case within the time above limited, he shall be deemed to have waived his right thereto: and when a case is made, and the parties shall omit, within the several times above limited, the one party to propose amendments, and the other to notify an appearance before the judge, they shall respectively be deemed, the former to have agreed to the case as proposed, and the latter to have agreed to the amendments as proposed. See further as to prepar-

time after amendments proposed, or by the judge, or by agreement of the parties as it may be by further analogy to the practice of the supreme court, the case should be drawn out, copied and served by the party who makes it, at or before giving notice of the motion, or the argument thereon for new trial.(*f*) It is held in England (sed vide No. 16.) that the form of the issue cannot be changed, on such motion; the propriety of the form of the issue can be questioned only, on an appeal from the decree, by which it was directed; a petition of appeal may (in England) be presented, and heard at the same time with the motion.(*g*)

No. 16. *Order for New Trial in case of Adultery.*

Order for new trial, on ground of admission of testimony not warranted by the issue; adjudging that a bill is good if it allege that the persons with whom, &c are unknown; allowing the issue to be amended. &c. See further this case, 6 Johns. Ch 347. see *ante* No. 6, 11, and notes. A third trial was had in this case, see the history of Ger-

[Caption, &c. § 32. p. 78, &c. This order was granted by the chancellor in the cause of Germond vs. Germond, 6 J. Ch. 347.] A motion having been made on the part of the defendant to set aside the verdict and for a a new trial upon the feigned issue awarded in this cause, and to have the feigned issue amended, and sundry documents and affidavits being read in support of the motion, and sundry other documents and affidavits being also read in opposition to the said motion, and the motion being argued by Mr. David Buel and Mr. Abraham Van Vechten, of counsel on behalf of the defendant, and by Mr. Velie, of counsel on behalf of the complainant, and due deliberation being thereupon had, *It is declared and adjudged*, that there is sufficient cause alleged for setting aside the verdict on this point, viz. that testimony was admitted against the consent of the defendant in support of the fact of adultery committed by the defendant, in R. county, with one or more persons not named in the feigned issue, and which feigned issue did not allege that adultery had been committed in that county with any person whose name was unknown, or with any other person than W. F. And, *It is further*

ing, and settling, and serving cases 7 Cow. 156. 467. 6 Cow. 38, 569. 5 Cow. 22. 4 Cow. 537. 3 Wend. 312. 2 Johns. Dig. 300-3. Caines' Practice 522, &c. 2 Dunlap, 667. &c.

(*f*) See 4 Cow. 537. 5 Cow. 22. But if the original case as served be acquiesced in, no further copy could be deemed necessary.

(*g*) 3 Swanst. 351. c. 1 Newl. Pr. 575. ed. of 1830.

declared and adjudged, that it would have been lawful for the complainant to have given testimony if he had been able, of adultery committed in the city of N. Y. by the defendant, with one or more persons not named, *Inasmuch* as there was a count in the feigned issue to that effect, and a bill for adultery is good if the person or persons with whom the adultery was committed was unknown, and it be so averred.(a) *It is thereupon ordered, adjudged and decreed*, that the verdict be set aside, and a new trial awarded, with liberty to the complainant to amend the feigned issue, and to insert therein the name or names of one or more persons discovered since the filing of the bill with whom the defendant may be supposed to have committed adultery in R. county, or elsewhere, to be therein stated, and which amendment would be warranted by the first general charge in the bill in these words, namely, that the defendant committed adultery, at divers times, with W. F. and others, to your orator unknown.

mond v. Germond, 2 Paige 112. 1 Paige 83.

No. 17. *Decree denying the Motion for New Trial, and discharging a Commission of Lunacy.*

[Caption, &c. § 32. p. 78. &c. Title, in the matter of I. P. an alleged lunatic. Case of Perine, April 16, 1823.] A feigned issue having been awarded to try the fact of the lunacy of the said I. P. who had been found a lunatic by inquisition, upon a commission of lunacy, on the 23d day of March, 1822, and the said feigned issue, under the title of *John Doe, plaintiff, against Richard Roe, defendant*, having been made up and brought to trial at the circuit-court held in and for the county of W. on the 13th day of June, 1822, touching the supposed lunacy of the said I. P. between the first day of December, 1819, and the first day of May, 1821, a verdict was found in favor of the defendant, and that the said J. P. was not a lunatic, and did enjoy lucid intervals, so that he was capable of managing himself, his messuages, lands and tenements, goods and chattels, between the periods aforesaid. A motion was thereupon made on behalf of the plaintiff in the said feigned

(a) But the time, place and circumstances also should be stated. 2 Paige 109. 112. see further *ante* No. 6, 11. and n.

CHAP. II.

issue for a new trial, on the ground of misdirection of the judge, and for that the verdict was against the weight of evidence, and the evidence taken upon the said trial, being read, and the motion argued by Mr. D. Russell, on behalf of the complainants, and by Mr. G. R. Davis, on behalf of the defendant, and the same being duly considered, It is ordered, &c. that the said motion be denied; and it is further ordered, adjudged and decreed, that the said commission of lunacy be, and the same is hereby superseded and discharged.

Decree on the equity reserved: See this case, 5 Johns. Ch. 148-152, &c.

No. 18. *Decree final after one Trial, and Verdict in favor of Will, and for perpetual Injunction.*

[Caption, &c § 32. p. 78, &c. Van Alst and others, v. Hunter and others, 5 J. Ch. 148, &c.] This cause having been brought to a hearing at the last term, upon the equity reserved, and the pleadings and proofs, and the record of the feigned issue heretofore awarded in the case being read, and the cause being argued by Mr. Henry and Mr. Emmet, of counsel for the complainants, and by Mr. David B. Ogden and Mr. Wells, of counsel for the defendants, and due deliberation being thereupon had, and the notes taken by the judge upon the trial of the feigned issue being also inspected and read: It is declared, &c. (See the residue of this decree in 5 Johns. Ch. 162.)

Costs.

Where a suit was instituted to establish a will against the heir at law, who obtained an issue of devisavit vel non, was defendant therein, as well as in equity, tried the issue, but it turned out to be a most wanton attempt to impeach the will, the court *refused* costs to the heir, and would have charged him with all the costs if any case could have been found to warrant it; but an heir, in such a case, could not be made to *pay* costs.(a) The rule, as deduced from all the cases in England is said to be: where the heir merely cross-examines the witnesses called to establish the will, and does not examine any witnesses to impeach it, he is *entitled* to costs; but not if he examine witnesses in chief. But he has not been ordered, it seems, to pay costs in any case. A distinction is made between those cases wherein he is plaintiff, and those in which he is defendant. Where he is plain-

(a) 13 Price, 608. Tucker v. Sanger.

tiff in a cause instituted for overthrowing a will, he has been made to pay costs; but not where he is defendant in any case of his resisting the establishing a will, on being called on to act in obedience to it, as in this case, and where the court give him an issue to try the validity of it, in which he is made defendant.(*b*) Where the verdict on an issue had been for the defendant, in consequence of a mis-direction, and a new trial had been had, upon which the plaintiff succeeds, the defendant was held liable to the costs of the suit, and of the application for a new trial, and of the second trial, but not of the first trial.(*c*)

MODES OF OPENING, SETTING ASIDE, OR RECTIFYING ORDERS AND DECREES.

§ 56 Vol. 1. p. 50. Opening, setting aside, amending, or altering orders or decrees by petition, motion re-hearing, appeal, &c. *post.* § 57-62 &c.

Any order or decree which has been obtained by default *or otherwise*(*b*) may be *set aside* on terms.(*c*) An order on motion made by the chancellor may on application to him be *discharged*, and if there were facts which the party thought material to the question, he

(*b*) Ib. The utmost the courts have done is, where insanity of the testator, or fraud on the part of the party seeking to establish it has been set up without any foundation, or he has insisted on mere want of form, to refuse him his costs. I should have had no difficulty(continues the Ld.Ch.Baron.) in making the heir pay all parties their costs in this case, if the authorities had borne me out in doing so, but I am sorry to find they do not. What I shall do, therefore, is, to refuse the heir his costs, and the other parties will have to pay their own costs only. 13 Price, ib. 619.

(*c*) 1 Jacob. 571, When a new trial was granted (in England, on an issue on a *modus*, in a tythe cause,) on motion of plaintiff after a verdict against him, and nothing was said about costs, and a second verdict was given for defendant, it was held that, as there was no obstinacy in praying an issue where the court is not satisfied, that directing the issue was the act of the court, and it would be hard on the plaintiff to order him to pay the defendant all the costs; under the circumstances, the bill was dismissed as to the tythes covered by the moduses, plaintiff to pay all costs of that part of the suit, both in law and in equity, *except the costs of the first trial of the issue*, and as to that, each party pay his own costs. 13 Price, 755.

(*b*) Qu. [illegible] if orders by *consent* may not be opened. But see vol. 1. p. 51. 36.

(*c*) R. 126. see vol. 1. p. 50-1.

CHAP. II.

may bring those facts under his consideration. Such application would not be a re-hearing of the former motion, but in fact, a new motion. The orders of the Vice Chancellor are (in England) in this respect, the orders of the Chancellor, and if a party think he can displace the order of the Vice Chancellor by new facts, he is entitled to take that course. Such an application is a new motion, rather than an appeal from the judgment of the court below. Hence, on a motion to discharge an order made by the Vice Chancellor, affidavits may be read, sworn after the order was made, and stating facts which were not before the Vice Chancellor(*d*) Application to *vary* the minutes of a decree made upon deliberation should be by petition by which all the facts may be brought before the court again; not by motion, when the court would be proceeding merely on memory, and doing what ought to be done only on the merits.(*e*) But an application to *rectify* a decree on a suggestion in aid of it, which would have been adopted at the hearing as of course, and amounting to no more than a slip, as where it is sought to introduce a reference to inquire into an existing contract for the benefit of all concerned to ascertain and give effect to it, may be by motion without the formality of petition.(*f*) Delay may be the ground of refusing leave to *amend*, as where a year and an half elapsed before the party applied to the Chancellor to correct a mistake made in drawing up a decree.(*g*) Though a decree may, on seasonable application by petition or motion be rectified in an obvious error or mistake,(*h*) yet, it seems, that an existing decree cannot be essentially *altered* except on re-hearing or appeal.(*i*) But where in a suit for administration

(*d*) 2 Russ. 161. 163. Const. v. Barr. So in England, a motion after being refused by the Vice Chancellor, may be made before the Chancellor, see 1 Turn. and Russ. 94. But see ch 1. *ante*, and vol. 1. and 2 Paige 94 as to the relative powers of the Chancellor and Vice Chancellors.

(*e*) 9 Price 479.
(*f*) 13 Price 866.
(*g*) 1 Paige. 188.
(*h*) See authorities vol. 1. p. 51.
(*i*) Held in equity side of Exchequer in England that the court cannot alter a decree absolute, varying from the decree *nisi*, on motion. If the justice of the case should manifestly require it, or

testator's assets, the Master found that a legacy bequeathed to J. S. was a vested legacy, and due to his personal representatives (who were not parties to the suit) which was by the decree carried over to the account of J. S. (subject to the further order of the court) with a direction that it should not be sold or transferred without notice to B. (the plaintiff) the court held, (although contended that the decree had carried the legacy to the account of the personal representatives, and could not be altered except by a re-hearing or appeal) that the saving words and direction were sufficient to keep the question open, and that the court might order the money to be paid to plaintiff upon his petition, without re-hearing the former decree.(*e*)

§ 57. Vol. 1. p 52. Re-hearing, when and in what cases applied for. See ante § 56.

Generally speaking, all established general rules of practice must be adhered to, but they may be cautiously dispensed with in anomalous cases where they stand in the way of justice,(*a*) and there is no other remedy: consequently a motion for re-hearing may be made after the expiration of the period limited by the rule of court [vol. 1. p. 52.]: but an application thus made in one case was refused on the grounds that a re-hearing would not give effective relief, and there was another course which might be resorted to.(*b*) A rehearing must

there should be an obvious mistake, it must be done on a re-hearing. It is contrary to the rules of practice to make any such order, altering an existing decree on motion, and the court expressed an opinion that in such a case where the applicant had been, to a certain extent, clearly benefited, it could not be done even on a re-hearing, where it would be incumbent on the party to show that [illegible] had, by the first decree [illegible] obvious mistake, operated to his prejudice, 13 Price 265. (see *ante* vol. 1. p. 51.) But held in Chancery) where the words "and interest" had by a mere clerical error been dropped out of the decree entry in the Register's book was allowed to be amended (1 Russ. Ch. 475.) and where the error is in figures, and apparent on the face of the decree, it may be corrected on motion, otherwise must be by re-hearing. (*See* 2 *Sim.* and Stu. 64. Coop. 134. see 1 M'Clell. (Ex.) 96. But an order consequent on the decree, not varying it, is regular. Thus on a decree declaring the rights of parties under a will, an order on petition authorising the executrix who in mistake had made payments in respect of an annuity two years before the annuitant arrives at age, to retain them out of future payments of the annuity, was held on appeal from the rolls, to be regular. 3 Russ. 287. (*e*) Barksdale v. Abbott, 3 Russ. 86.

(*a*) 13 Price 322, 324, 325.

(*b*) Ib. The rule of court admits a rehearing after the thirty days, but on terms. See vol. 1. p. 52. 3 J. Ch. 3 64. In England, the pet-

CHAP. II.

be of the same matter :(c) where the object is not to correct an error on the record, or in the Master's report, but to remedy a grievance consequent upon the decree resulting from circumstances *ex post facto*, not making part of the case, as it originally came before the court, a re-hearing will not be granted, because that is not, in such a case, the proper or efficient course for redressing such an injuiry, from the nature of the proceeding. The course, as intimated, might be, by proceeding in the nature of an *audita querela*, in which the new circumstances may be introduced to the notice of the court, and the effect of the existing decree got rid of by a formal review.(d) A re hearing upon the ordinary certificate of counsel will not be granted, where upon the hearing the defendant's counsel, after the opening argument, abandoned the defence. To obtain the re-hearing, the defendants must show a violation of duty on the part of their counsel, or that he had clearly mistaken either the law or the facts.(e) If a motion for re-hearing be made for delay, it will be refused.(f) A re-hearing is never granted to enable a party to obtain cumulative testimony, or to contradict the witnesses examined by the adverse party. Thus, where one of two defendants was examined as a witness for the complainant, subject to all just exceptions, and his testimony upon the hearing was rejected upon the ground of interest, and a final decree made in the cause, the court refused a re-hearing to enable the complainant to release the interest of the witness, and to re-examine him in order to support the testimony of another witness, and to contradict the positive answer of the defendant, and the

tion for re-hearing must, by a general rule, be presented also within a month after the order pronounced. But re-hearings have been granted at the distance of two, eighteen, twenty-four, and even thirty years. 1 Mer. 36. Amb. 9. 9 Ves. 172. 18 Ves. 319. 3 P. W. 2, 242. 3 C. R. 37. cited 1 Newl. Pr. 656-7, 3d ed. and 1 Grant, 240, ed. of 1829. And though the rule is, that after enrolement there can be no appeal or re-hearing, yet the court, under special circumstances, will open the enrolment to let in that mode of redress. 1 Ves. 205, 206, 326. 3 Swanst, 334. n. 1 Turn. R. 178. Sed vide 5 Ves. 702 16 Ves. 1 1 Sch. and Lef. 234. c. 1. Newlib. 663-4. 3d ed. 1830.

(c) See vol. 1. p. 53. n. (18.)

(d) Bowyer v. Bright, 13 Price, 316.

(e) De Carters, &c. v. La Farge, &c. 1 Paige, 574.

(f) 1 Paige 256.

evidence of a witness examined on his part,(g) a remainder-man may appeal, or re-hear a cause; so even creditors, not parties to the suit, but coming in under the decree.(h)

No. 1. *Petition for re-hearing.*

§ 58
Vol. 1. p. 52.
How applied for:
No. 1. Petition for re-hearing, see also 3 Johns. Ch. 364. Also Bla. 169. 171. 41 app.
No. 2. Affidavit by Solicitor verifying the petition;
No. 3. Certificate of counsel to said petition.
No. 4. Notice of presenting petition.
No. 5. Order to stay proceedings where the petition had been presented *ex-parte*. See form, p. 37, and vol. 1, p. 23.

[Title, address, &c. see § 5. p. 20. J. C., B. R., S. K. and J. C. ads. C. S., W. B and M. H. But the complainants are now named first, p. 23. See the decree on which this petition was founded, p. 86, and see affidavit, p. 89. See *post*. Order for re-hearing on this petition, *post* § 59. No. 2. See this case, Smith v. Carll, 5 Johns. Ch. 118.] To the chancellor of the state of New-York: the petition of the above-named defendants, respectfully shows: *That your petitioners consider themselves aggrieved by the decretal order made by you* in the above entitled cause, on the twenty-ninth day of December last; whereby it was, among other things declared, that T. H. the lunatic in the pleadings mentioned, was not of sound mind and mentally competent to make the purchase in the pleadings mentioned, either on the 6th, or on the 14th of April, 1818; whereupon it was ordered, adjudged and decreed by you, that the deed, &c. (see the words of the decree, p. 86.) and that the defendants on service of a copy of the said decree, should deliver up, &c. (ib. 86-7.) and that the complainants should, at the same time, deliver up to the defendants to be cancelled, the deed aforesaid, to the said T. H. and that the defendants should pay, &c. (ib. 87.) within, &c. or that in default of such payment, the complainants have execution, &c. according to the course and practice of the court.

And your petitioners submit, with great respect, that the said decree is erroneous, in that it declares that the said T. H. was not of sound mind and mentally competent to make the purchase of the defendants in the pleadings mentioned, either on the 6th or on the 14th of April, 1818, and thereupon proceeds to annul the said purchase and the deeds executed in pursuance thereof as aforesaid; because your petitioners show unto you, that it is

(g) 2 Paige 24.
(h) 1 Sch. and Lef. 409. c. 1 Newl. Pr. 655. 3d ed.

CHAP. II.

testified by four witnesses at least, who have been examined in the cause, and who were all present at the time when the said purchase was agreed to be made by the said T. H. on the said 6th of April, 1818, that he appeared, on that occasion, to be in full possession of his rational faculties, and of sound mind, so as to be competent to make the said purchase, or to that effect; whereas, no witness has testified to the incompetence of the said T. H. on the particular occasion now referred to, otherwise than by inference or presumption, founded on observations made or rumours heard at other periods: and as to the 14th of April aforesaid, when the deeds in the pleadings mentioned were executed, four witnesses, at least, two of whom were different from those above-mentioned, and all of whom were present at such execution of the said deeds, have deposed in substance, that the said T. H. conducted himself on that occasion, with his usual intelligence and discretion, and appeared to be of sound mind and understanding, and competent to transact such business: whereas no witness has deposed to the contrary of this, unless it be by inference or presumption as aforesaid, founded on observations made, or rumours heard at other times and places. *And your petitioners apprehend* the weight of the evidence in the cause, as to the terms of the said purchase, to be such as to support the conclusion that the said T. H. did, in fact, use his ordinary sagacity and understanding in making his part of the contract.

And your petitioners further submit, that the said decree is also erroneous in this, that even though the state of the evidence were to be considered as unfavourable to the validity of the deeds in the pleadings mentioned; yet, before the same be decreed to be null and void by reason of the supposed lunacy of the said T. H. at the time of the execution thereof, your petitioners would be entitled, upon equitable principles, to have a feigned issue awarded to try the fact of such supposed lunacy. And your petitioners did, by their counsel, distinctly insist before you, but without argument, at the hearing of the said cause, that according to the usages and principles of this court, although the deeds aforesaid might be affirmed and supported, they could not properly be annulled and set aside, without a previous award of a

feigned issue for the purpose aforesaid. And it was upon this understanding, on the part of your petitioners, said counsel, that they did not, at the hearing, formally apply to you, and argue at length, to have such issue directed, in case the opinion of the court upon the evidence, should be against your petitioners. *And your petitioners show* to you, that before the time for examining witnesses in this cause had expired, your petitioners were informed by their counsel aforesaid, that there was no reason to apprehend that the sale made by your petitioners to the said T. H. would be set aside without a previous award of a feigned issue as aforesaid; and for this reason, among others, your petitioners, acting under the advice of their said counsel, and wishing to avoid needless expense, omitted to procure the examination of sundry persons whom they might have procured to be examined as witnesses, and who would have testified from their own observation, that the said T. H. was, in their judgment, in possession of his ordinary reason and capacity for business at or about the times of the making and the execution of the contract in the pleadings specified; and your petitioners confidently believe, that if a feigned issue had been awarded for the purpose aforesaid, they should be able to procure the attendance of the several persons above alluded to, or most of them, as witnesses, at the trial thereof.

And your petitioners further respectfully submit, that the decree before mentioned is erroneous in another particular: For that whereas it appears by the testimony which has been taken in the cause, that after the making of the contract in the pleadings mentioned, the said T. H. proceeded to the actual possession and use of the premises thereby agreed to be purchased, and put a tenant thereon; which possession and use, by such tenant, have continued hitherto; and that the said T. H. committed waste and damage upon the said premises, and diminished the value thereof, to a very considerable amount, besides taking and enjoying the rents and profits of the said premises: And whereas, your petitioners' counsel, when proceeding at the hearing of the cause, to argue before you, that your petitioners, even if the decree of the court should in other respects be against them, were entitled to an account of the rents and profits, waste

CHAP. II.

and damages aforesaid, were interrupted by the counsel on the part of the complainants, and prevented from going at large into such argument, on the ground that the said counsel, on the part of the complainants, did not mean to contest your petitioners' right to such account as aforesaid, but distinctly admitted the same; in consideration of which admission your petitioners' counsel waived the prosecution of the said argument, as having thereby become needless: Nevertheless, you have not by the said decree, directed such account as aforesaid, nor made any order whatsoever in that behalf. *And your petitioners respectfully represent*, that down to the present time, the tenant who was put upon the premises aforesaid by the said T. H as above-mentioned, has continued to occupy and use the said premises, and to deliver a proportion of the annual produce thereof to the family of the said T. H. who have taken and appropiated the same from time to time, as their convenience or pleasure has dictated; and that in case such account were to be decreed to your petitioners as aforesaid, they would be able to prove, at the taking thereof, that the proportion of the said rents and profits received by the said T. H. and his family, or which has gone to his estate, together with the diminution of the value of said premises by means of the waste and damages aforesaid, has been to the amount of several hundred dollars in value, and more, as your petitioners believe, than half the amount of the monies which by the said decree, are ordered to be paid by your petitioners to the complainants in the said cause. *And inasmuch* as your petitioners have not been heard upon the subject of their right to have such account as aforesaid decreed to them; and especially because they were deprived of such hearing by means of the distinct admission of the said right on the part of the complainants' counsel, *your petitioners humbly conceive and submit* to you, that the said right ought to have been recognized by the said decree, or at least, that your petitioners ought yet to be heard in that behalf.

Whereupon your petitioners respectfully pray, that you will be pleased to grant them a re-hearing of this cause before you, your petitioners submitting to pay such costs

in that behalf as you shall deem meet to impose, in case their complaint shall finally appear groundless.

Dated the 20th day of January, 1821.

H. W. D. Solicitor and of counsel for defendants.

——, of counsel.

No. 2. *Affidavit of Solicitor verifying the Petition.*

[Vol. 1. p. 53. see *ante* p. 23. 35.]

[Title of cause.] City and County of New-York, ss. H. W. W. Solicitor and of counsel for the defendants in this cause, being sworn, saith, that to the best of this deponent's knowledge, information and belief, the several matters of fact alleged and set forth in the foregoing petition, are true: (or that the said petition is true in substance and matter of fact, according to his best knowledge, information and belief. (Signed, sworn, &c.)

No. 3. *Certificate of Counsel.*

[Title of cause.] We certify, that we have examined this case, and that in our opinion the decree *or* order is erroneous in the particulars mentioned in the (foregoing, within, or annexed) petition. Dated, &c.

(Signed by two counsel not solicitors in the cause.)

No. 4. *Notice of presenting Petition.*

[Title of cause.] Sir,—Take notice, that the original petition, affidavit and certificate, of which copies are herewith served upon you, will be presented to the chancellor, at a court of chancery to be held at, &c. on, &c. (see § 14. *ante* p. 39. 42, &c.) instant, at ten o'clock in the forenoon, (*or* at the opening of the court in the forenoon of that day, or as soon thereafter as counsel can be heard,) at which time and place a motion will thereupon be made, that the prayer of the said petition be granted: which motion will be grounded upon the said petition, and upon the pleadings, proofs, exhibits, decrees, and other proceedings in this cause.

Dated New-York, &c.

To ——, complainant's Solicitor.

——, Solicitor for Petitioners.

CHAP. II.

If the petition be presented ex parte for the purpose of obtaining an order to stay proceedings, annex to the copies a copy of a certified copy of said order, and serve the same as directed. [§ 12. both vols. *ante* p. 37. 87.]

§ 59.
Vol. 1. p. 53. See § 56.
No. 1. Order granting a re-hearing with special conditions.
2. Like order denying the petition in part, and directing a re-hearing on other points of the former decretal order.
If a re-hearing be denied, no appeal from order denying, except in peculiar cases. As to notice of re-hearing &c. *post* § 60.

No. 1. *Conditional Order for Re-hearing.*

[Caption and title, *ante* § 82. p. 78. This order was granted by the Chancellor in the cause of Murray ads. Mumford and Dunscomb, Nov. 5. 1822. See the case 6 Johns. Ch. 452. See the decree on the re-hearing *post* § 61. second form.] A motion having been made on the part of the defendant in pursuance of the prayer of his petition for a re-hearing of this cause upon the subject matter, and for the reasons stated in the said petition, and the said petition with the affidavits and documents thereto annexed being read, and the motion argued by Mr. R. S. and Mr. J. V. H. on behalf of the motion, and by Mr. H. W. W. and Mr. S. J. in opposition thereto, and duly considered, It is ordered that the said motion be granted upon the following conditions, namely: That the usual deposit(a) of fifty dollars be forthwith made with the Register or Assistant Register subject to the future order of the court in respect to the costs of the re-hearing: Secondly, that the cause be set down for hearing and be considered without further notice as regularly set down for hearing on the —— day of —— instant. That the defendant be at liberty in the mean time to take such steps as he shall be advised touching the production of the requisite evidence of the letter in the petition mentioned, and particularly to file a bill for discovery merely, touching the said letter, provided such bill be filed, and a copy served on the Solicitor for the complainant by this day week, and that the complainant be at liberty to answer the same without process or other delay, and that the defendant be at liberty to move for a postponement of the hearing on the —— instant if an answer should not have been given to such

(a) The *deposit* is now regulated by R. 115. ante vol. 1. p 53. The petition generally submits to pay all costs the court should direct. Ante, No. 1. & 3 J. Ch. 364-5. The decree or order after re-hearing, will direct the payment or surrender of the deposit. See forms *post* § 61. No. 1. and note.

bill of discovery; and when given, that the defendant forthwith pay to the Solicitor of the complainant the cost of such answer. And it is further ordered, that if the conditions hereby annexed to the granting of the said motion be not complied with on the part of the defendant, that the said motion be deemed to be denied with costs to be paid by the defendant to the complainants. CHAP. II.

No. 2. *Order Denying Re-hearing in Part and granting it in Part.*

[Caption, &c. § 32. p. 78. title: Smith and others v. Carll and others. See the case, 5 Johns. Ch. 118. See the petition on which this order was granted, *ante* p. 297.]

On reading and filing a petition on the part of the defendants for a re-hearing of the said cause on the ground of alleged error in the decretal order made on the twenty ninth day of December last, in the particulars therein stated, and the affidavit, and certificate annexed thereto being also read, and filed, and a motion made in pursuance thereof by Mr. H. W. W. of counsel for the defendants, and the same being opposed by Mr. W. and the affidavits of J. W. and G. W. S. in opposition to the said motion being also read and filed, and due deliberation thereupon had, It is ordered that so much of the said petition as relates to that part of the said decretal order declaring the deed and bond, and mortgage therein mentioned null and void, and directing the said deed and bond, and mortgage to be delivered up to be cancelled, and the acknowledgment of satisfaction of the said mortgage, be, and the same is hereby denied. And it is further ordered that a re-hearing be granted only in respect to the omission in the said decretal order to direct an account to be taken of rents and profits, waste, and damages as claimed or stated in the petition, and that so much of the said decretal order as directs the payment to the complainants of the monies therein mentioned be in the mean time suspended, provided, however, that the said re-hearing is granted upon the condition that the defendants within *twenty* days after their Solicitor shall have notice of this order de-

posit(*g*) with the Register or Assistant Register fifty dollars towards the expense of the re-hearing, in case the said decretal order should not upon such re-hearing be materially altered, and upon the further condition that the said cause be set down on the part of the defendants for such re-hearing on the first day of the next term of this court, and that so much of the said decretal order as exempted the defendants from the payment of interest on the sum of one thousand three hundred and eighty dollars therein mentioned, and from the payment of costs of suit be deemed, and taken on such re-hearing to be opened.

It is said (vol. 1. p. 53, 55,) that if a re-hearing be denied, and the petitioner aggrieved, he may appeal. But in a recent case before the court of errors, it was held, that no appeal could be sustained on an order refusing a *re-hearing of a motion* for instructions to the Master as to the examination of a witness, as his report is open to exceptions, and any error in his duty might be corrected: nor, it seems, in any other case of an order refusing a re-hearing, unless under very peculiar circumstances.(*a*)

§ 60. Vol. 1. p. 54. Preparations for re-hearing No. 1. *Notice* of re-hearing. No. 2. *Affidavit* of service thereof. No. 3. *Note of Issue.* No. 4. Points.

No. 1. *Notice of re-hearing.*(*b*)

(Title, &c. § 14. p. 39-43.) Take notice, that I shall bring this cause to a re hearing on the decretal order on hearing, upon the *pleadings and proofs* [or as the case may be,] therein before the (*Vice*) Chancellor (*of the first circuit,*) of the State of New-York, at, &c. on, &c. [see p. 42, 43. vol. 1. p. 26-8. *or*, the time in the order for re-hearing, if fixed, ante § 59.] *or*, as soon thereafter, as counsel can be heard. Dated, &c. your's, &c. —— Solicitor for complainant. To ——, Solicitor for defendant.

No. 2. *Affidavit of Service thereof.*

[Title of cause, &c. and other forms, § 5. 17. 35. 40. See p. 55.] City and County of New-York, ss.

(*g*) The deposit is now required, by a standing order of court, to be made in ten days after the order for re-hearing. Vol. 1. p. 53.

(*a*) 4 Wend. 170.

(*b*) Sometimes the order fixes the time, and directs without notice. See § 59. No. 1.

J. N. T. student at law in the office of G. W. S. solicitor for the complainant in this cause, being duly sworn, deposeth and saith, that he did, on this —— day of —— instant, personally serve on ——, esq. solicitor for defendant, a copy of the annexed notice, by handing the said copy of the said annexed notice to a clerk in the office of the said ——, *the said* —— *being then absent therefrom* (c) (Signed.) (Sworn, &c.) § 8.

No. 3. *Note of Issue.*

In Chancery.

A—— B——
v.
C—— D——(d)

Fourth Class.(e)
Pleadings and Proofs.(f)
Issue joined the ——, 183C.(g)
——, Solicitor for *Complainant.*
——, Solicitor for *Defendant.*

This cause will be brought to a *re-hearing*, at the next (stated *or* special § 15. vol. 1. p. 27. vol. 2. p. 43.) term, before the (Vice) Chancellor (of the —— circuit.)
Dated N. Y. ——, 1830.

Your's,
—— Solicitor, for *Defendant.*

To —— (*Assistant*) Register, *or*,
Clerk of the —— circuit.

(Indorsed.)

In Chancery.
Before the *(Vice)* Chancellor of the —— circuit.(i)

A—— B——
v.
C—— D——(j)

Note of Issue 4th Class.
——, Solicitor for *Defendant.*

(c) But ante p. 55. n. (d.)
(d) p. 21, 23. R. 95.
(e) See classes, vol. 1. p. 307. In case of *re-hearing*, the class is the same as it was before the order reheard, and entitled to like priority. R. 91. vol. 1. p. 53.
(f) *Or*, on pleadings, *or*, bill and answer, *or*, on exceptions to report &c. vol. 1. p 307.
(g) *Or*, an answer put in on, &c. vol. 1. p. 315. 307.
(i) R. 7.
(j) R. 95 ante p. 23.

CHAP. II.

Notes of issue made in more than one cause by the same Solicitor, are to be on separate papers. The note of issue may be delivered at any time, within office hours, on Thursday, when the term commences on Monday.

No. 4. *Points.*

In Chancery: before the, &c.

J——— L———
v.
G— D— W——

Points on the part of the Complainant.

First.—The complainant is entitled to an account of the timber cut by him on the premises described in the pleadings in this cause, and delivered to the defendant during the year allowed to the complainant for the redemption of said premises.

Secondly.—Upon the supposition that it should be held that the complainant is not entitled to an account of the surplus proceeds of the sale made by the defendant of the said premises, after re-imbursing to the defendant his actual advances, the complainant would clearly be entitled to the $1,000 mentioned in said pleadings, with interest thereon.

Thirdly.—But the complainant is entitled to an account of the said surplus proceeds, after reimbursing to the defendant his actual disbursements.

§ 61. Vol. 1 p 54. Re-hearing, annuling, or affirming former order or decree. No. 1. Decretal order on re-hearing, confirming former order rejecting ex-parte evi-

No. 1. *Decree on re-hearing confirming former Order with Costs, and rejecting ex-parte Proof taken since the hearing.*

[Caption, &c. p. 78, Dale, &c. v. Roosevelt. See this case, 6 Johns. Ch. 255.] This cause having been brought to a re-hearing upon the pleadings and proofs, and certain depositions taken since the last hearing *ex-parte*, and without due notice, or opportunity to cross-examine, being offered in evidence on the part of the defendant and objected to, were over-ruled,(a) and the

(a) From the language of this decree it might be inferred that the depositions would have been admitted on the re-hearing, if due notice and opportunity to cross-examine had been given. But the report of this case (6 Johns Ch. 255-6.) seems to exclude new testimony to the merits, and to limit it to such as has been duly taken in chief and

cause being re-argued upon the pleadings and original proofs by Mr. D. B. Ogden and Mr. S. Jones, of counsel for the defendant, and by Mr. Ch. Graham and Mr. Wells, of counsel for the complainants, and due deliberation being thereupon had, it is ordered, &c. that the former decree be, and the same is hereby, in all respects confirmed; and it is further ordered, that the defendant pay to the complainants their costs of this re-hearing, to be taxed, and that so much of the *deposit* (*b*) made by the defendant on granting the re-hearing, as may be wanting, be appropriated for that purpose.

dence taken since the hearing, and directing deposit for costs to be paid over.

Another form confirming former decree after additional proof

Another confirming order on motion to dissolve injunction.

No. 2. Decree confirming former decree, and ordering costs and deposit to be

Another form confirming former Order after additional proof.

[Caption, § 32. p. 78. Mumford, &c. vs. Murray, December 1822. See p. , this case, 6 Johns. Ch. 452.] This cause having been brought to a re-hearing at the last term upon the petition upon the part of the defendant for a re-hearing, and the decretal order thereon, and upon the additional exhibits and the cross-bill and answer filed subsequently to the granting of the said

omitted to be read on hearing, or to papers since found and provable *viva voice*, or evidence to the incompetency of a witness. [1b. and ante, vol. 1. p. 54.] In the decree in Mumford and Murray (next form.) new evidence to the merits, of the documentary kind, was admitted: but liberty to produce the evidence, and particularly to file a cross bill for the purpose of discovery, was made a condition in the order for re-hearing. [See § 59, No. 1.] In England, not only evidence which was given in the cause, and not used at the hearing, may be read (the circumstance being always taken into consideration in disposing of the costs.) but, it seems, that new evidence also, if it be shewn to be in its nature admissible, and a proper ground for its introduction be laid, may be received. (2 Russ. 91, 92, in which case the document sought to be introduced was excluded, no sufficient foundation being laid. See 9 Price, 186. 9 Eagle, 1048. cited in that case.) If therefore, new evidence become important, a successful foundation, perhaps, may be laid for its introduction by uniting the application for that purpose with that for a re-hearing, setting forth, in the petition, the nature of the new evidence, shewing such excuse as exists for its non-production before, and supporting the application by affidavit.

(*b*) As to *deposit*, see p. The Register, &c. will, on production of the order, pay, divide, or apportion the deposit, as the court directs, after deducting his commissions. Whatever directions the court gives on a re-hearing, are to be carried into effect as others are, and if costs are given to either party beyond the deposit, they are to be recovered in the usual manner. (1 Grant, 241-2. 2d ed.) as directed, ante § 21. p. 60-62-3. and after taxation by the proper officer, *post.* § 82. vol. 1.

CHAP. II.

paid over. No. 3. Order on re hearing upon bill, and plea with its accompanying answer confirming the decree except a part covered by the plea, and as to that part that the plea stand for an answer with liberty for complainant to amend bill and except. &c. *Another form.* reversing order, without the costs of the hearing. No. 4. Another form. that plea

petition, and upon the pleadings and former proofs in the cause in reference to the new matter so in proof, and the cause being argued by Mr. R. Sedgwick and Mr. Hoffman, on the part of the defendant, and by Mr. H. W. Warner and Mr. S. Jones, on the part of of the complainants, and the same being duly examined and considered, it is declared that the decretal order made and pronounced in this cause on the third day of January last, was just, and it is accordingly ordered, adjudged and decreed, that the same stand in all respects as it is therein declared and decreed.

Another form confirming Order on motion to dissolve Injunction.

[Caption, &c. § 32. p 78. Chamberlin and others v Fitch.] This cause having been submitted by Mr. Crary, of counsel for the complainants, and by Mr. Stevens, of counsel for the defendant, upon written arguments, upon a re-hearing of the motion to dissolve the injunction, and the bill and the answer, and the arguments of the counsel being read and duly considered,

and answer stand good in part, defendant to answer other parts, costs be reserved, deposit returned, complainant at liberty to amend bill, and defendant to answer amendments also. No. 5. Decretal order annulling in part the former order, varying the principles of reference in taking the account. No. 6. Final decree upon re-hearing, upon pleadings and proofs, arising upon an original bill, supplemental bill, and also upon bill of revivor; annulling former decree of dismissal, pronouncing and setting aside, a judgment as fraudulent, and a purchase as having been made with notice decreeing that purchaser execute release, and awarding costs except against the purchaser. No. 7. Order, on a re-hearing by consent, on pleadings and proofs directing the cause to stand over to make another person party, and continuing the injunction. No. 8. Decretal order (on re-hearing vacating the former decree and substituting another) for reference to compute *interest only*, for sale of mortgaged premises, and that as future instalments become due complainant be at liberty from time to time, as the interest of principal becomes due, to go before Master upon the foot of this decree, and obtain a report of amount due, that an order may thereupon be made for further sale. &c. No. 9. Final decree (on re hearing, confirming former decree) allowing some and over-ruling other exceptions to Master's report (the argument on same being brought on at same time by consent) directing a reference and decreeing payment. No. 10. Decree (on re-hearing) upon question of costs. No. 11. Another decree as to costs, see the form. No. 12. Another as to costs of one, and costs and interest of another defendant: see the form. No. 13. Decree on re-hearing, declaring the construction of the former not to have been to effect the right of dower in a party ordered to join in a conveyance, and that the master settle the form, &c. 14. Second re-hearing.

it is declared that the judgment at law in the pleadings mentioned must be taken to be just and right, and there is no fraud or accident, or undue advantage stated or admitted sufficient to authorize this court to interfere with the judgment at law, and to grant a new trial, inasmuch as the matter was properly cognizable and discussed and determined by the court of law having jurisdiction of the case. And it is further declared, that the judgment appearing to be against the complainants jointly, upon a joint contract, the demands of the complainants separately, each in his individual capacity, do not form the proper subject of a set off against the joint judgment, and the existence and validity of any such individual demands, is also fully denied in the answer, it is thereupon ordered, that the former order of this court dissolving the injunction be, and the same is hereby confirmed.

No. 2. *Decree confirming former Decree ordering costs and deposit to be paid over.*

[Caption, &c. § 32. p. 78. Harring, &c. v. Cornell, &c.] This cause having been brought to a re-hearing upon an order founded upon the petition of the defendants, as to the matter in the said petition specified, and the pleadings and proofs in the cause, and the said petition having been read, and the same being debated by Mr. H. Sedgwick, on behalf of the defendants, and by Mr. S. Jones, on behalf of the complainants, and being duly considered, it is ordered, adjudged and decreed, that the decree of this court of the twenty-third day of June last, in this cause be, and the same is hereby in all respects confirmed, and "That, &c. (take in the words from the former decree.) And it is further *ordered*, that the defendants pay to the complainants their costs of this re-hearing to be taxed, and that the whole, or so much of the money deposited with the register, on granting the order for the re-hearing, as shall be requisite to satisfy such costs after deducting the register's fees thereon, be paid to the Solicitor of the complainants, or to his order.

No. 3. *Decretal Order on re-hearing on Bill and Plea confirming Order in part, &c.*

[Caption, &c. § 32. p. 78. Kane & Kane v. Bloodgood and others. See this case, 7 Johns. Ch. 90.] This cause having been reheard upon the bill and plea with its accompanying answer in respect to a part of the decretal order heretofore made in this cause, and which part is specified in the petition for such re-hearing, and the same being argued upon paper by Mr. A. Van Vechten and Mr. J. V. Henry, of counsel on the part of the complainant, and by Mr. H. Bleecker, of counsel on the part of the defendants, and the arguments of the counsel and the pleadings being duly considered, it is declared and adjudged, that the decretal order made and pronounced in this cause, on the 16th day of October last, was just, except as to so much of the plea as covered that part of the bill which seeks satisfaction for, or on account of any dividends or profits, on share number 41, prior to the 1st day of July, 1815: and it is ordered, &c. that the plea as to that part of the bill which seeks satisfaction for or on account of these dividends or profits stand for an answer, with liberty to the complainants to except, and that the complainants be at liberty to amend the bill, as they shall be advised, and as the practice of the court shall warrant, upon payment of costs, and the other usual terms, and with liberty also, within twenty days, to except to the answer. (Vol. 1. p. 267-8.]

Another form, reversing Order of Dismissal, without Costs of re-hearing.

[Caption § 32. p. 78. Kirby v. Taylor, impleaded, &c.] This cause having been re-heard upon the bill and the plea with its accompanying answer of the defendant, John Taylor, and the case being argued by Mr. J. Duer and Mr Harison, of counsel for the complainant, and by Mr. C. Baldwin and Mr. W. Slossen, of counsel for the defendant, John Taylor, and due delibration being thereupon had; It is declared, that the decree in this cause, of the first day of August, 1821, was erroneous in directing the complainant's bill to be dismissed as against the said John Taylor, and it is further declared,

that the plea with its answer is good only so far as it goes to protect the said John Taylor as surety for John Thomson, against all and every responsibility to which the said John Thomson might have been liable under the bond in the pleadings mentioned prior to the release stated in the plea: It is thereupon ordered, &c. that the former decree in this cause, dismissing the complainant's bill as against the defendant, John Taylor, be reversed, and that the plea of the said John Thomson stand for an answer, and that no costs of this re-hearing be charged be either party against the other.

No. 4. *Another Form that plea and answer stand good in part, &c.*

[Caption, &c. § 32. p. 78. French and others v. Shotwell. See the case 5 Johns. Ch. 555-559-560, &c. 6 J. Ch. 235.] This cause having been brought to a re-hearing upon the pleadings in pursuance of the order of this court, of the thirteenth day of, &c. and the pleadings being read, and the cause debated by Mr. J. V. Henry, of counsel for the complainants, and by Mr. William Slosson, of counsel for the defendant, and due deliberation being thereupon had: It is declared that the plea, with its accompanying answer, is good as to all that part of the bill which goes to impeach the consideration of the judgment in the bill mentioned of the defendant against D. T. B. of the date of, &c. either for usury, extortion, fraud, or other cause alleged in the bill; It is thereupon ordered, adjudged, and decreed, and the Chancellor, by the authority of this court, doth order, adjudge, and decree, that the said Plea and answer stand good to the above extent, and the defendant, within (*six weeks*) after notice to his solicitor of this decretal order, answer such parts of the said bill not covered by the plea, as relate to the charge of fraud in the sale in *Saratoga* county, or to any payments which may have been made upon the said judgment, to the end, that the balance (if any) due thereon, may be ascertained: And it is further ordered, that the question of costs be reserved, and that the deposit of fifty dollars made with the Register in pursuance of the order for a re-hearing, may be returned to the complainants' Solicitor. And it is further ordered, that the complain-

CHAP. II.

ants have leave to amend their bill within (*thirty days*,) and that they serve the Solicitor for the defendant, gratis, with a copy of the amendments and with an apt designation of the parts of the bill in which they are to be introduced, and in case of such amendments, that the defendant have (*six weeks*) thereafter, to answer the said amendments, as well as such parts of the bill as are not covered by the plea and its accompanying answer as aforesaid.

No. 5. *Decretal Order on re-hearing, varying the principles in taking the Accounts.*

[Caption, &c.] § 32. p. 78. Beekman admr. &c. v. Genet.] This cause having been brought to a re-hearing at the last term, as to certain specified parts of the decretal order or decree of the first day, &c. charging the defendant with one fifth of the amount of the principal of a certain bond and mortgage mentioned in the pleadings in this cause given by the defendant to G. C. esq. deceased, for the sum, &c. and dated, &c. and also with one fifth of the amount of the principal of two promissory notes mentioned in the said pleadings given by the defendant to the said G. C. deceased; one of the said notes being for the sum, &c. and dated, &c. and the other of the said notes being for the sum, &c. together with interest thereon, from the, &c. the day of the death of the said G. C. and the said cause touching the parts aforesaid of the said decretal order or decree being debated by Mr. Wells and Mr. S. Jones, of counsel for the defendant, and by Mr. P. C. Van Wyck, of counsel for the complainant, and due deliberation being thereupon had, and inasmuch as the said mortgage was never registered, nor the principal or interest of either the bond or notes aforesaid, or any part thereof, demanded in the life time of the said G. C. and inasmuch as the said G. C. in an account book made by him charged his daughter, C. G. then the wife of the defendant, with sundry advances, and among others, with the said bond and notes, and prefacing the charges with a caption that it was on account of property given to his children, and for which they were respectively charged on the settlement and division of his estate among them, if not otherwise directed by his last

will; It is declared, that the value or amount of the said bond and notes is to be deemed as an advancement made by the said G. C. to his daughter C. then the wife of the defendant: And it is accordingly ordered, &c. that in taking and stating the accounts directed to be taken and stated by the decretal order or decree aforesaid, the said defendant be not charged with the said bond and mortgage or notes, or either of them, and that the former decree in that respect be, and the same is hereby altered and corrected.

No. 6. *Final Decree upon re-hearing, annulling former Decree of dismissal, &c.*

[Caption, &c § 32. p. 78. D. S. 2d, and A. P. sole heir at law of R P deceased, v. W. W. and J. D. Case of Safford, &c. v. Waters, &c. May 12, 1823.] This cause having, at the last term, in pursuance of a decretal order of this court for that purpose heretofore granted, been brought to a re-hearing upon the pleadings and proofs arising upon the original bill filed in favor of the complainant, D. S 2d, and R P. now deceased, against the defendant W. W. and also at the same time upon the pleadings and proofs arising upon the supplemental bill, and also upon the bill of revivor in favor of the complainant A. P. against the defendants, and the said pleadings and proofs being read, and the cause argued by Mr. Crary, of counsel on behalf of the complainants, and by Mr. Van Vechten, of counsel on behalf of the defendants; and the whole of the said pleadings and proofs being examined together, and duly considered, and inasmuch as new and strong light has been thrown on the case by the testimony taken since the filing of the supplemental bill, it now appears from a view and comparison of the whole testimony in the cause, to the entire satisfaction of the Chancellor, that the decretal order made on the 13th of March, 1817, dismissing the original bill is erroneous, and that the bond and warrant of attorney, in the pleadings mentioned, upon which the judgment at law was confessed and entered, on the 24th day of October, 1813, were procured by the defendant W. W. from the complainant D. S. 2d, by gross fraud and imposition, and without any just and valuable consideration, and that all the

CHAP. II. subsequent confessions procured from the said D. S. 2d, are chargeable to the same undue and fraudulent influence, and made in violation of the right and title of R. P. now deceased, after his right and title had accrued, and had been procured by him as a bona fide purchaser of the premises in question, for a valuable consideration, without notice in fact of the said judgment. And it is further declared and adjudged, that the defendant J. D. took an assignment of the said judgment from the defendant W. W. on the 16th day of October, 1816, pending the suit on the original bill, and prior to the decree of dismissal of the said bill, and was a purchaser of the premises in question at the sale on execution under the said judgment, with notice given at the time of the sale, of the allegation in the original bill, that the said judgment was obtained by fraud and without consideration, and was consequently a purchaser at his own peril. It is thereupon ordered, &c. that the said J. D. within thirty days after notice of this decree, and upon demand made by or on behalf of the complainant A. P. execute and deliver to the complainant A. P. a release in fee, by deed, of all his right and title under the said judgment and purchase of, in, and to the seventy two acres of land, in the town of, &c. being lot number 20, in the patent of, &c. with proper and apt covenants to be settled by any one of the Masters of this court, against his own acts and deeds in relation thereto, and with a proviso to be inserted in the said deed, that the same is made with a reservation of the privileges secured to the complainant D. S. 2d, by a lease bearing date the 25th day of October, 1814, and executed by R. P. deceased, to the said D. S. 2d, and that he also, within the same time, and upon the like demand made by, or on behalf of the complainant D. S. 2d, execute and deliver to the complainant D. S. 2d, a release of all his right and interest in the said land, as contained in the said reservation, with a similar covenant to be made with the like approbation against his own acts and deeds affecting the same. And it is further ordered, adjudged and decreed, that the said J. D. upon the execution and delivery of the said releases, at the same time deliver to the complainants respectively, possession of the said lands, according to their rights and interest therein as afore-

said. And it is further ordered, adjudged and decreed, that the decree heretofore rendered in the original cause upon the original bill, and which was subjected to revision by the said order for a re-hearing, be deemed and taken to be vacated and reversed. And it is further ordered, adjudged and decreed, that the defendant W. W. pay to the complainant D. S. 2d, his costs of the original and supplemental bills, and of the proceedings thereon, and to the complainant A. P. his costs of the bill of revivor, and of the proceedings thereon, to be taxed, and that they respectively have execution therefor, according to the course and practice of the court, and that no costs of suit be charged by the complainants, or either of them, against the defendant J. D. inasmuch as he is not implicated in the fraud.

No. 7. *Order that cause stand over to make another party, &c.*

[Caption, &c. § 32. p. 78. Delavan v. Tice and Tice.] This cause having been brought to a re hearing by the consent and agreement of Mr. A. L. McDonald, Solicitor, and of counsel for the complainant, and Mr. S. G. Huntington, Solicitor, and of counsel for the defendants, and the same being submitted by the said counsel upon written argument upon the pleadings and proofs; and an objection being taken that R. G. a party in interest in the cause, was not made a party to the suit, and the objection appearing to be well taken; It is thereupon ordered, that the cause stand over with liberty to the complainant to amend his bill by making the said R. G. a party, and by adding such charges as to a combination between the said R. G and the other two defendants, to defraud the complainant, or, instead thereof, by filing a supplemental bill in order to bring the said R. G. before the court, or otherwise, as he shall be advised; and it is further ordered that the injunction staying all proceedings at law in the suit in the pleadings and proofs mentioned be continued until further order, and that the question of costs and all further questions be reserved.

No. 8. *Decretal Order (vacating former Decree,) for Sale for Arrears of Interest on Mortgage, and to cover future defaults.*

See ordinary forms on foreclosure and sale for *principal* and interest, ch 7. § 17. Rules of court appendix No. 14, *ante* vol. 1. p. 211-12.

[Caption, &c. § 32. p. 78. Ellis v. Craig and others. See this case, 7 Johns. Ch. 7.] This cause having been brought to a re-hearing, in pursuance of an order of this court made upon application on the part of the complainant and the pleadings and proofs being read, and the cause re-argued by Mr. Bulkley on behalf of the complainant, and by the defendant S. D. Craig in proper person; It is ordered, adjudged, and decreed, that the former decree made in this cause on or about the 15th day of July last, be vacated, and in lieu thereof that it be referred to one of the Masters of this court to compute the amount of the *arrears of interest* due and to become due on the first day of February next, on the bond in the pleadings mentioned, and that the defendant, S D. C. pay such *interest* after the same be so computed and the Master's report filed, within thirty days thereafter, together with the complainant's costs of this suit (the costs of the first hearing and decree in this cause excepted,) and, in default thereof, that the mortgaged premises mentioned in the pleadings, and which are know and described as follows, (here take in the description of the premises) or so much thereof only as shall be necessary to raise the *interest* so to be reported due, and the costs, and which can be sold separately without material injury to the parties, or either of them, be sold by and under the direction of one of the Masters of this court, on giving [usual notice for the city of New-York. See vol. 1. 117. 212.]: And that, &c. [see other special directions in the common forms on foreclosure under the new rules, vol. 1. 211-12. R. of court, appendix No. 14. and post ch. 7. § 17.] and that out of the proceeds of such sale, after deducting the costs thereof, the Master pay to the Solicitor for the complainant, the *interest* and costs aforesaid, and that the residue of the proceeds, if any be brought into court, to abide the further order of this court [but see further, ib.]; And inasmuch as it appears by the pleadings that the mortgage is to secure the principal sum of $10,000

which is not yet payable, and the interest thereof, which is payable quarterly, to wit, on the first days of February, May, August, and November, in each year, and that therefore interest will become payable to the complainant hereafter, as well as the said principal sum which ought to be raised out of the said mortgaged premises, or the remainder thereof, in case of default by future sales thereof, in case the whole of the said premises shall not be sold under the above order of sale: It is thereupon further ordered, that the complainant shall be at liberty hereafter, and from time to time, as the said interest shall become payable, or when the said principal shall become due, to go before a Master, upon the foot of this decree, and obtain a report as to the sum then due and payable, to the end that such report being made to this court, an order may thereupon be made for a further sale of the residue of the mortgaged premises, or parts thereof, to satisfy what shall be so reported due, with the costs attending such report and sale: And it is further ordered, that the complainant pay to the defendants, E. M. and J. J. their costs of entering their appearance and putting in their answers, and not any costs of the subsequent proceedings, and that in the taxation of the costs, only so much of the joint answer be allowed to them as the Master shall deem to be strictly and properly their exclusive answer.

No. 9. *Final Decree (confirming former) on exceptions to Report, directing Reference as to exceptions allowed, and decreeing payment.*

[Caption, &c. § 32. p. 78. Case of Gray, executrix of Gray, deceased, v. Murray. See 4 Johns Ch. 412. 3 J. Ch. 167.] This cause having been brought to a re-hearing upon the decretal order on hearing, and the matter of the said decree being argued by consent upon paper in vacation time, by Mr. Samuel Jones, of counsel for the defendant, and by Mr. Robinson, of counsel for the complainant, and a motion being made upon the argument by Mr. Jones, that the deposition (taken de bene esse) of ——, a witness on the part of the defendant, who had been examined in chief, and whose testimony taken in chief by the examiner had been read and considered upon the former hearing of this cause, and which deposition stated and purported to correct

CHAP. II.

what was alleged to have been inaccuracy and mistake in his former testimony aforesaid, should be read and received as evidence upon this re-hearing, and the said motion being opposed by Mr. Robinson, and duly considered, the same was denied, and the pleadings and proofs in the cause, together with the arguments of the said counsel being read and duly considered; It is declared, that the decretal order made and pronounced in this cause, on, &c. was just, and it is accordingly ordered, adjudged, and decreed, and the Chancellor, by the authority of this court, doth order, adjudge, and decree, that the same stand in all respects as it is therein declared and decreed; and several exceptions having been taken on the part of the defendant to the Master's report made in pursuance of the said former decretal order, and the same being argued upon paper by consent, and concurrently with the said argument upon the re-hearing by Mr. Samuel Jones, of counsel, in favor of the exceptions, and by Mr. B. Robinson, of counsel, in opposition to them, and the said exceptions being duly considered, together with the arguments of the counsel thereon; it is ordered, adjudged, and decreed, that the first, fourth, fifth, and last exceptions are well taken, and are hereby allowed, and that the residue of the said exceptions are not well taken, and are hereby disallowed; and three several exceptions having been taken on the part of the complainant to the said report, and the same being argued and duly considered, and the testimony before the Master not being sufficiently reported nor admitted in respect to those exceptions to enable the Chancellor to determine with precision on the weight of the exceptions; It is ordered, that the said three exceptions be, and the same are hereby disallowed; And it is further ordered, adjudged, and decreed, that the said report be referred to one of the Master's of this court, to be corrected in respect to the matter of the exceptions allowed, according to the allowance of the same, and that the said report, in other respects, stand confirmed: And it is further ordered, that the sum due to the complainant on the fifteenth, &c. according to the said report and the schedule A. to the same annexed, amounting to, &c. after the said amount shall have been altered and corrected according to the exceptions

hereby allowed, be paid to the complainant or her Solicitor, together with interest on the said amount, that shall be reported to be due to the complainant upon such correction, from the said fifteenth, &c. until paid, and together with the costs of this suit, and including the costs of this re-hearing, to be taxed, within thirty days after the said report shall have been corrected and made, and notice thereof and of this decree given to the defendant: And it is further ordered, that in taxing the costs no charge be allowed by either party as against the other, for taking and arguing any of the said exceptions.

No. 10. *Decree, on re-hearing, on question of Costs.*

Proportioning the costs against one of defendants.

[Caption § 32. p. 78. Tiernan v. Miller, Wilson and Gale. See 6 Johns. Ch. 411-6.] This cause having been brought to a re-hearing at the last term in respect to the question of costs, and the same being argued upon that question by Mr. Henry, on behalf of the complainant, and by Mr. S. M. Hopkins, on behalf of the defendants, and due deliberation being thereupon had, it is ordered, &c. that the former decree be altered on the point of costs, so far as it respected the defendant J. W. It being now declared and adjudged, that the said J. W. in selling at one time, and in one entire parcel, the right and title of the complainant, to an undivided moiety of two hundred and a-half acres in lot number 1, and two hundred and thirty-six and a-half acres in lot number 2, in the pleadings mentioned, to raise the sum of $10 25, was a gross and flagrant breach of trust and duty as a public officer, for which he ought, in equity, to be chargeable with costs. It is thereupon further ordered, adjudged and decreed, that the said defendant J. W, pay to the complainant such a proportion of his costs of this suit to be taxed, as arose and have been incurred by the suit against the said J. W. and his defence thereupon, and that the Master upon taxation, determine and allows such a proportion of the complainant's costs of this suit as he shall deem properly so chargeable against the said J. W. and that the complainant have execution therefor against the said J. W. according to the course and practice of the court, and that the former

CHAP. II.

decree as to costs in respect to the other defendants, and in all other respects, be and remain unaltered.

No. 11. *Another Decree on re-hearing as to Costs.*

Allowing costs on demurrer, but none of re-hearing.

[Caption § 32. p. 78. Gregory & Withers, overseers of the poor, &c. v. Reeve & Hull, overseers, &c. See the case, 5 Johns. Ch. 232.] This cause having been brought to a re-hearing by consent, touching the question of costs, and the same being argued in writing by Mr. Henry, of counsel for the defendants, and by Mr. Abraham Van Vechten, of counsel for the complainants, and duly considered, and it appearing to be the usual practice in the English courts of equity, to allow the defendant his costs if he prevails upon his demurrer, it is thereupon ordered, &c. that the complainants pay to the defendants their costs of this suit to be taxed, excepting however the costs of this re-hearing, and as to which no costs are to be allowed to either party as against the other, and that the former decree as to the question of costs be considered as altered and corrected.

No. 12. *Another as to Costs and Interest.*

Decreeing that an attorney or agent who is always ready to pay over on demand of the person entitled to receive the avails of land sales, or monies collected, and who gives due notice thereof, and does not speculate with the money, is not chargeable with *interest or costs.*

[Caption, &c. § 32. p. 78. *Title:* E. W., A. W. M., S. W. and M. his wife, J. W., &c. &c. which four last mentioned complainants are infants, and prosecute by T. S. their next friend, v. H. R S., W. J., and W. F. See this case, Williams and others v Storrs and others, 6 Johns. Ch. 353.] This cause having been re-heard, touching the question of interest and costs as respects the defendant H. R. S. and touching the question of costs as respects the defendant W. F. and the same as between the complainants and the defendant H. R. S. being argued by the said Henry R. Storrs, in proper person, and by Mr. S. Jones, on his behalf, and by Mr. A. Van Vechten, on behalf of the complainants, and the case being duly considered, and the pleadings and proofs read in respect to the point re-heard, it is declared and adjudged that the defendant H. R. S. received the monies which he is charged to have received in the course of his agency, as an agent for these representatives of A. M. deceased, entitled to the same, and that he was not bound to pay but to the party authoritatively entitled to demand and receive, and no

such demand, by any such party, was made upon him, inasmuch as J W the father of the infant complainants, was not entitled in any other character than a legally constituted guardian in this state, to demand the monies belonging to the infant complainants, nor was the complainant A. W. M. by virtue of letters of administration granted under the authority of the state of Connecticut, entitled as such administrator, to demand and receive the same. And it is further declared and adjudged, that the facts in the case do not warrant the charge of any default or breach of duty in the defendant as such agent, nor of any profit or interest made by him out of the monies so received, nor of the employment of the same in any business or speculation of his own, and that the defendant was always ready to account for the same when duly called on for this purpose. It is thereupon ordered, adjudged and decreed, that the decree rendered in this cause, on the tenth day of July last, be so far corrected as that the said defendant H. R. S. be not charged with any interest on the monies so received by him, nor with the complainants' costs of this suit. And a re-hearing having been ordered in this cause in respect to the costs charged by the said decree to the defendant W. F. and the same being submitted without argument by Mr. Sill, Solicitor for the complainants, and by Mr. W. Barnes, Solicitor for the said defendant W. F.; and it appearing that the decree awarding costs against the said W. F. was evidently founded in mistake, inasmuch, as there is nothing in the case warranting any charge of debt or default against the said W. F. it is thereupon ordered, &c. that the said decree be also in this respect so far corrected, as that the defendant W. F. be not charged with any costs to the complainants, or any of them; and that the said decree in all other respects stand as it is therein declared and decreed: It being the true construction and meaning of the said decree, and most manifestly just from a mere inspection of the pleadings, that the defendant W. J. be no further chargeable with the complainants' costs of this suit, than such as necessarily arise from the Master's report of the sum due on the mortgage and the decree, so far as it relates to the sale of the mortgaged premises, and so far as costs may be created by the sale thereof.

CHAP. II.

No. 13. *Decree declaring the intent of a former Decree, &c.*

[Caption, § 32. p. 78. E. B, C. M'E., and R. L. C., executors of A. R deceased, v. M. Le R. impleaded with others. Benson, &c. v. Le Roy, &c. See 4 *Johns. Ch.* 651.] This cause having been brought to a re-hearing by consent of the counsel on each side, so far as respects the defendant M. Le R and the same being argued upon paper by Mr. T A. Emmet, of counsel for the said defendant, and by Messrs. Boyd and T. L. Ogden, of counsel for the complainants, and due deliberation being thereupon had, it is declared, that the decree of the 9th day of June, in the year of our Lord, 1821, was not intended, and ought not so to operate, or be construed as to impair or affect any right of dower which the said defendant M. Le R. doth or might have in the lands and premises to be sold and conveyed under that decree, and that her right of dower, whatever it may be in law and equity, was not intended to be intermeddled with in this cause, it is thereupon ordered, &c. that when the said M. Le R. shall join in any conveyance to be made and executed in pursuance of any sale directed in and by the said decree, she be at liberty to join in the same under an express reservation of all and singular her right of dower, whatever it may be in law and equity, in the lands so to be conveyed, and that the Master under whose direction such sales may be made, settle the form of such reservation, to be inserted in the deeds of conveyance to be executed by the said M. Le R. And it is further ordered, adjudged and decreed, that the said decree be in all other respects confirmed.

Second Re-hearing.

The rule (*a*) that a cause can not be re-heard a second time, pre-supposes an *affirmance* of the prior decree by the *same* officer, or by the Chancellor on appeal from the decree of a Vice-Chancellor. Cases therefore may be supposed where a second re-hearing might be granted, as where the same officer, on re-hearing, annulled, or essentially varied his former decree; (*b*) or if the hearing should

(*a*) R. 112. *ante* vol. 1. p. 54.

(*b*) Lord Manners 'considered it to be his duty to review his opinions when called upon so to do in order to save the expense and delay of an appeal if possible.' 2 *Ball & Best.* 75.

be before one vice-chancellor, who, before application for re-hearing should resign, and the cause be re-heard before his successor, who should decree essentially different from his predecessor, a second re-hearing it seems might be proper.(a) But if the cause is heard and re-heard before the same officer, and he *affirms* his former decree, there is no reason to suppose he will change his opinion, and if a second re-hearing were allowable it might tend only to delay. This appears to be the spirit of the general rule which is similar here as in England.(b) But where the same vice-chancellor has no opportunity of reviewing his opinion, or the chancellor has not affirmed it on appeal, the rule it seems does not preclude a second re-hearing; otherwise an appeal is the only resort.

APPEALS.

§ 62. Vol. 1. p. 54-6. Appeals in what cases. See further v. 1. *ante*. and § 63. 64. 66. 71.

The distinction between a re-hearing, properly so called, and an appeal, properly so called, is understood to have been this: That upon a re-hearing you might read evidence which had not been collected before the hearing, though it was not read at the original hearing; but upon appeal you could read only that evidence which you had read below, and if there was evidence which you had not read below, you could not use it upon an appeal, though you might have used it upon a re-hearing.(c) On an appeal to the Chancellor from an interlocutory order (refusing a stay of proceedings) of a circuit judge of the late equity court, it was held that the question of affirmance or reversal depended on the facts before that court at the time of the decision; that if those facts entitled the appellant to a stay of proceedings, the decision was erroneous and must be reversed; and that affidavits presented by the respondents' Solicitor *ex parte*, since the hearing of the cause

(a) See Laud v. Wickham, 1 Paige 256.

(b) 16 Ves 214. 13. Ves. 421. But the rule there is not inflexible, and under special circumstances, a re-hearing has in fact taken place twice and thrice. (1 Dick. 426. 1 Vern. 7, 214, 232. 2 Ch. Rep. 85. 3 ib. 78. 1 Vern. 90. 94. 2 Ves. jr. 272. 581. 3 Ves. 332. 492. 2 Ves. and B. 359) and a cause has been heard and re-heard (twice, however, on appeal,) six times. (2 Ch. Ca. 200. See also 5 Bro. P. C. 476. 4 ib. 149.

(c) 2 Russ. 91.

CHAP. II.

could not affect the question.(a) But appellate courts proceeding according to the course of the civil law, may allow parties to introduce new allegations or further proofs. It is not a matter of course, however, to receive further proofs. If appellant wishes to have the facts reviewed on new evidence in the appellate court, he should, in his petition of appeal, ask leave to produce further proofs, and state his excuse for not having produced them in the court below. But from the organization of the court of errors, it is doubtful whether the right to introduce new allegations and further proofs, exists on appeals from sentences or decrees of chancery in testamentary causes.(b) And upon an appeal from the sentence of a surrogate disallowing a will, the court of chancery will not change the appellant, he being the executor who propounded the will before the surrogate, by substituting the legatee, in order to give the legatee the benefit of the executor's testimony in favor of the will.(c) A person cannot present or join in a petition of appeal, although he may have an interest in the question, *unless* he was (or represents) a party in the matter in the court below.(d) But a remainder-man, or creditors not parties, coming in, may appeal.(e) An appeal may be prosecuted in *forma pauperis*.(f) The order appealed from must affect the merits of the cause. An order for sale of property the subject of contest, and directing the money to be brought into court, relates only to the preservation of the property, and is not appealable.(g) The *refusal* of a re-hearing, unless under peculiar circumstances it seems is not the ground of appeal, [p. 304.] An order or decree by consent, or in its nature by consent, is not appealable. As an order for a cause to stand over, with liberty to amend the bill by adding parties: if the plaintiff is dissatisfied with the opinion of the court

(a) 2 Paige 164. 168. But on appeals from Vice-Chancellor's under the revised statutes, it seems, that new proofs, if properly brought forward (perhaps in the notice of appeal or in a separate petition,) might be admitted. The Chancellor may dispose of the whole subject. See *post* § 69 and *ante* § 56. 57. 61. p.

(b) Scribner v. Williams, 1 Paige 550.

(c) Ib. 1 Paige 550.

(d) 1 Bligh's New (P.) Rep. 18.

(e) 1 Sch. and Lef. 409 cited. 1 Newl. 655. 3d ed.

(f) 2 Jac. and W. 402 cited, ib.

(g) 4 Wend. 173.

as to want of parties, he should let his bill be dismissed, and then appeal from the order of dismission.(a) But it seems that a party, by consenting to an order consequential on a decree, does not preclude himself from the right of appeal.(b) A party having appealed against one part of a decree in a suit where the title is not in issue thereby, virtually submits *to rest* of it, and cannot afterwards present a new appeal against other parts of the same decree.(c)

Common Pleas.

No. 1. *Appeal.*

In the matter of ——, an alleged habitual drunkard, on the relation of ——, overseers of the poor of the town of ——, county of ——.

An order, pursuant to the judgment or determination of the court of common pleas, in and for the (city and) county of ——, made upon the proceedings instituted in the above matter, having been entered in the office of the clerk of said court, on the — day of, &c., in the words following, to wit: At a court of common pleas, held at, &c. in and for, &c. on, &c. Present, &c. In the matter of, &c. (copy the order): The said ——, who is the person named in the preceding title, conceiving himself aggrieved by the said order, doth hereby appeal from the said order, and every part thereof, to the chancellor of the state of New-York, and prays that his appeal may be entered accordingly; that the proofs and proceedings in the said matter may be duly transmitted to the court of chancery, and that all further

§ 63. Vol 1. p. 56-7. Appeal from common pleas in relation to the person and estate (where less than 250 dollars,) of a habitual drunkard. No. 1. Appeal or statement and notice to that effect to be filed in the clerk's office of the court

(a) 2 Cox. 156. cited. 1 Newl. Pr. 657. 3d edit. The consent of counsel is to be given on their own conception of the authenticity of their instructions, and if given, is binding on the client. (Ib. 1 Jac. and W. 673. *ante* v. 1. p. 15.) But where two counsel appeared or the parties with instructions, the one to consent, the other instructed by a different Solicitor to oppose, except on terms, the court directed the matter to stand over, and the authorities under which the Solicitors acted, to be verified by affidavit. 1 Jac. and W. 673. cited 1 Newl. 658. 3d ed. 1830.

(b) 1 Mer. 35. 38. cited. Ib.

(c) 3 Bligh's (P.) Rep. 261. See *post* § 76

CHAP. II. of common pleas.

proceedings in the said matter, before the said court of common pleas, may be stayed, until the said appeal shall have been determined. Dated, &c. (signed) —, attorney for said appellant. ——, of counsel.

No. 2. Bond for costs accompanying the appeal. No. 3. Petition of appeal to the Chancellor. The transcript and other proceedings thereon are similar to those of appeals from surrogates *post* § 64.

No. 2. *Bond.*

Know ye (or know all men) by these presents: That we (the appellant and his sureties) of, &c. are held and firmly bound unto ——, overseers of, &c. in the penal sum of one hundred dollars, lawful money of the United States, (or current money of the state of New-York,) to be paid to them, their successors or assigns: for payment whereof we jointly and severally bind ourselves, our and each of our heirs, executors and administrators, firmly by these presents. Sealed with our seals, and dated at, &c. on, &c. The condition of this obligation is such, that, whereas the said —— hath appealed to the chancellor of the state of New-York, from the judgment order or determination of the court of common pleas of the (city and) county of ——, made on the — day of, &c. 'In the matter of ——,' &c. as by reference to said appeal (accompanied by the present bond and) this day, *or* lately filed in the office of the clerk of said court will more fully appear: Now, therefore, if the said ——, the appellant aforesaid, shall pay to the said —, overseers as aforesaid, their successors or assigns, such costs as shall be awarded against him the said appellant in case of the order, judgment or decree, of the said court of common pleas, being affirmed on said appeal, then the above obligation shall be void, otherwise remain in full force. (Signed, sealed and attested.) The sureties must be such as the court approve. An affidavit therefor of the sureties, that they are severally worth, over and above all their debts and responsibilities assumed by them, double the amount of the penalty may be submitted with the bond for approval.

No. 3. *Petition of Appeal.*

The form is similar and the proceedings the same as in appeals from surrogates, *post* § 64. and may, after the title, (but see p 21.,) and address 'To the Chancellor,' &c. p. 20-1. continue thus:

The petition and appeal of ——, respectfully showeth: That ——, overseers of, &c. heretofore filed their petition before the court of common pleas, in and for the ——, praying that a commission in the nature of lunacy might issue against your petitioner, pursuant to the provisions of the revised statutes: And such proceedings were thereupon had, that at a court of common pleas, held at the court-house, in ——, before the judges of the same court, on —, an order or decree, pursuant to the judgment or determination of said court, was made and duly entered in the office of the clerk of the said court, in the following words: (*The order.*) Your petitioner feeling himself aggrieved by the said order or decree, and the judgment or determination of said court in the premises, and being advised that the same is erroneous, afterwards, to wit, on, &c. caused his appeal from the whole of said order or decree to be entered, and a bond, with sureties approved by the said court, to be filed in the office of the clerk aforesaid. And your petitioner hath appealed therefrom to this court, for the following amongst other reasons and errors in the said order or decree, viz. first, &c. secondly, &c. [If the case justify it (*a*) add: And inasmuch as your petitioner was unable, by reason of, &c. to prove, &c. (on the taking of the inquisition or on trial of the issue awarded, &c. or whatever the excuse may be) your petitioner craves leave to produce further proofs, viz. &c.] Wherefore your petitioner prays that the said order so appealed from, may be reversed or so modified as to correct the errors aforesaid, and that such other or further order may be granted in the premises, as the Chancellor may deem just. (Signed by the Solicitor and the counsel for appellant.)

SURROGATES.

§ 64.
V. 1 p. 57-9. Appeals from Surrogates. No. 1. Ap-

The time allowed for appealing from the decree or sentence of the Surrogate is computed from the time the same is made and entered by the Surrogate, (*b*) not from

(*a*) Sed qu. whether this clause *could* be introduced in *this* appeal, see p. 324. In such case the petition not being founded on matter of record, should be verified in the usual manner. See jurat § 8. p. 35. or by an affidavit of the facts sought to be introduced.

(*b*) 2 R. S. 610.

CHAP. II.

peal or notice in nature of, to be filed with the Surrogate.

No. 2. Bond for costs and diligent prosecution of appeal.

No. 3. Bond as a stay of proceedings below in certain cases.

No. 4. Petition of appeal: *First*, from a final order on settlement of accounts of executors, &c.

No. 5. *Secondly*. Cross appeal in the above case.

No. 6. *Thirdly*. Petition of appeal in relation to the appointment, removal, &c. of guardian.

No. 7. Special order in the last case for the guardian to show cause.

No. 8. Order for return of transcript, and for further time.

Form of tran-

the time of service of a copy of such decree. An appeal entered after thirty days (in the specific case) from the time of the final sentence, was on motion quashed or dismissed for irregularity.(*b*)

No. 1. *Appeal.*

In the matter of the settlement of account of —— executors, &c. *or* of the appointment, &c. of ——, &c. a guardian, &c. } *To the Surrogate of the County of* ——

An order or decree in the above matter having been duly entered in the office of the Surrogate of the (city and) county of ——, on the —— day of —— in the year, &c. in the following words: [if a short order, as on appointment of a guardian, &c. insert it; but it is conceived, that it would be sufficient to refer to it by its date and the title of the matter. The appeal is intended as notice to the Surrogate and opposite party, and if it apprises them of the object of such appeal, it is sufficient. But if part only of the order or decree be appealed from, such part should, agreeably to the analogy of practice in other cases, be designated,(*c*) or the words 'from the *whole or* from every part of said decree,' omitted or qualified.] And the said ——, who is, &c. (next of kin of said —— deceased, and entitled, &c. *or* a creditor of said ——, *or* the executor *or* administrator, &c.) conceiving himself aggrieved by the said order or decree, doth hereby appeal from the said order or decree, and from every part thereof, to the Chancellor, and respectfully requests that his appeal may be entered accordingly, and that the pleadings, proofs and proceedings in the said matter may be duly transmitted to the court of chancery, that the said court may proceed upon the said appeal, and do therein what shall appertain to law and justice; and that all further proceedings in the said matter before the said Surrogate

(*b*) Bay v. Van Rensselaer, 1 Paige 423.

(*c*) This is required in appeals from Vice Chancellors, see vol. 1. p. 61. But no petition of appeal is there presented, as on appeals from Surrogates, or to the court of errors, *post* § 74.

may be stayed until the said appeal shall have been heard and determined.—Dated, New-York, &c.

——, Proctor for ——.
——, Advocate for ——.

script. No. 9. Decree reversing appointment of administrator, and directing administration to be granted to appellant, and awarding costs out of the assets.

No. 2. *Bond for Costs and diligent Prosecution of Appeal.*

Know all men by these presents, that we —— (the appellant) of —— and ——, and ——, (two sureties) of ——, are held and firmly bound unto —— (the appellee) in the sum of one hundred dollars lawful money of the state of New-York, to be paid to him the said—— his executors, administrators and assigns: For the payment whereof well and truly to be made we jointly and severally bind ourselves, our and each of our heirs, executors and administrators firmly by these presents, sealed with our seals: Dated at, &c. on, &c.

The condition of this obligation is such, that whereas the above bounden —— has appealed to the Chancellor of the state of New-York, from the order or decree of the Surrogate of the county of ——, made on the —— day of, &c. 'In the matter of ——, a minor,' and hath caused his said appeal to be this day (or lately) filed in the office of the said Surrogate: Now, therefore, if the said —— shall diligently prosecute his said appeal to effect, and shall pay all costs that may be adjudged against him by the court of chancery of the said state, then this obligation shall be void, otherwise remain in full force. (Signed and sealed.)

I approve of the sufficiency of —— and ——, the above (or within) named sureties. Dated, &c.

——, Surrogate of, &c.

No. 3. *Bond for Stay of Proceedings.*

[In specific cases where such bond is required, see vol. 1. p. 53.; the form may be as follows:] Know all, &c [as before] are held and firmly bound unto The People of the State of New-York in the sum of (not exceeding $1000) to be paid to the said The People of the State of New-York: For the payment whereof, &c. we jointly and severally, &c.

The condition, &c. that whereas the above bounden ——, executor of the last will, &c. having herewith filed

CHAP. II.

in the office of the Surrogate of —— an appeal to the Chancellor of the state of New-York on the —— day, &c. from the order of the said Surrogate made on the —— day, &c. 'In the Matter,' &c. for awarding process for the commitment of the said —— for not rendering, &c. [see 2 R. S. 610. § 111.] Now, therefore, if the said order so appealed from shall be affirmed, and if, &c. [follow the words of the statute, ib. § 112.] Signed, sealed and approved, as in No. 2.

No. 4. *Petition of Appeal from Surrogate's Order on Settlement of Accounts of Executor or Administrator.*

In Chancery.

Before the Chancellor.

J. T. C. Appellant,
v.
J. R. and others, Respondents. (*a*)

} To the Chancellor of the State of New-York.

The petition and appeal of J. T. C. administrator of the estate of John R. deceased,

Respectfully showeth,

That Jane R. mother of the said John R. deceased, heretofore filed her petition before P. V. Esq. Surrogate of the county of R. praying that O. E. R. administratrix, and your petitioner, as administrator, should account, &c. and for a final settlement and distribution of the said estate, and such proceedings were had in the said matter that the same was brought to a final hearing before the said surrogate, and that he did, on the —— day of —— last, make his order and decree for a final settlement and distribution of the personal estate of the said intestate (in the words following, viz.: take in the order if the *whole* is appealed from, or if a part, then as follows): And, amongst other things, ordered and decreed, that the said petitioner was to be charged with the sum of —— for that portion of the inventory of the said intestate which came to his hands, and was to be

(*a*) But query, as to the propriety of any title, unless in the matter below, until the cause is in court, (*ante* p. 20-21. n. 27. n) especially if verified, as it should be, perhaps, if not entirely founded on matters of record in the court below, or if new proofs are sought to be introduced. See p. 324.

credited to his account for his discharges for debts and funeral charges paid by him the sum of ——— leaving a balance in favor of the estate of ———: And the said surrogate further decreed that your petitioner was to be allowed as a creditor of the estate of the said intestate, the sum of —— the balance due him on settlement of his individual account, from which deducting the balance in his hands, as administrator, he remained a creditor of the estate of the said intestate, in the sum of —— as by the said order and decree of the said surrogate, amongst other things, will more fully appear.

Your petitioner being advised that the said order and decree is erroneous, hath appealed therefrom to this court, for the following, amongst other reasons and errors in the said decree:

First.—For that the said surrogate has disallowed and refused to credit to the said administrator, all the items in his account rendered before the said surrogate and proven, contained in a copy and abstract of the said account annexed to his appeal, and referred to in the said abstract, and marked in the inner column of figures, "disallowed," all which items the said administrator was entitled by law, and by the proofs produced before the said surrogate to have allowed in the final settlement of the said accounts.

Second.—For that the said surrogate has disallowed to the said J. T. C. as a creditor of the estate of the said John R. and refused to credit him with the sum of —— for his commission on the purchase of a farm in the town of S. charged in the said J. T. C.'s account as a creditor of the said estate, and produced and proven before the said surrogate, and which by law and by the proofs produced before the said surrogate, ought to have been allowed and credited.

Third.—For that the said surrogate has disallowed to the said J. T. C. as last aforesaid, and refused to credit him with the sum of $100, being a counsel fee at the rate of $25 a year, and has also disallowed and refused to credit the said J. T. C. the sum of —— charged in his said account for interest on the balance due him

CHAP. II.

as a creditor of the said estate, and which upon the accounts and proofs before the said surrogate, ought to have been allowed and credited to him.

Wherefore your petitioner prays that the said order and decree of the said surrogate may be altered, amended, and modified, so as to correct the errors aforesaid. Dated this, &c.

J. Mc K.
Solicitor and of Counsel
for J. T. C.

No. 5. *Cross Appeal in the preceding Case.*

In Chancery.

J. R. and O. E. R. } Appellants.
v.
J. T. C. and others, } Respondents.

To the Chancellor of the
State of New-York,

The Petition of J. R. and O. E. R. respectfully showeth:—That on the petition of Jane R. the above-named O E. R. and J. T. C. were cited to render an account of their trust as administrators of the estate of John R. deceased, that such proceedings were thereupon had that by a decree of the said surrogate, the estate of the said John R was ordered to be distributed, one half to your petitioner, O. E. R. and the remainder equally between your petitioner, J. R. and the brothers and sisters of the said John R.; and a large sum of money was decreed to be paid to the respondent, J. T. C. And your petitioners are advised that the said decree is erronous, and your petitioners have therefore appealed to this court, for the following among other reasons, viz:—

First.—Because by the said decree the brothers and sisters of the said J. R. are declared entitled to receive certain portions of the said estate.

Secondly.—Because the said decree allows to the said J. T. C. a much larger sum than in justice, and equity, and right he is entitled to receive.

Thirdly.—Because by the said decree the said J. T. C. is allowed for divers services, expenses, and charges, to which, as administrator, he is not by law entitled.

Fourthly.—Because by said decree the said J. T. C.

is allowed for large sums by way of costs, and expenses in the proceedings before the said surrogate, and which are not by law chargeable or allowable against the said estate.

Fifthly.—Because the said O. E. R. is by said decree directed to pay over to the said J. T. C. a large sum of money to which he the said C. is not entitled, and to which he has no just or legal claim.

And your petitioner prays that the decree so appealed from may be reversed, or so modified as to do justice as well to your petitioner as the respondent.

S. M. W. Solicitor.
M. T. R. of Counsel.

No. 6. *Petition of Appeal from Surrogate on Appointment, &c. of Guardian.*

[Title and Address, see Form No 4] To the Chancellor, &c. The petition and appeal of H. L. of —, a merchant, and M. N. of ——, farmer, respectfully showeth: That O. P late of ——, died seized and possessed of a large real and personal estate, leaving two infant children his heirs at law, without appointing by will any guardian for them during their minority :(*a*) that on or about the ——, T. R. the Surrogate of the said county of ——, made a certain order or decree for the appointment of F. L. guardian to each of the said infant children, in the words and figures following : (*copy the order*) And your petitioners further show, that they are both residents of this state, your petitioner H. L. residing in ——, county of —— ; and your petitioner, the said M. N. residing in —— aforesaid (*or* that your petitioner —— resides in —— in the state of ——(*b*) that your petitioner, the said H. L. is the sister, and your petitioner, the said M. N. the brother of the said O. P. deceased, and the nearest or next of kin surviving the said O. P. : Your petitioners therefore, being interested(*c*) in the appointment of a guardian to the said infant children, and entitled, either jointly or one of them, to such

(*a*) See 2 R. S. 150.

(*b*) A non-resident relative might unite for the purpose of showing his assent, and pray the appointment of the resident as guardian. But it seems that a person without the jurisdiction of the court will not be appointed.

(*c*) 2 R. S. 153. § 18.

CHAP. II.

guardianship, as next of kin aforesaid: Wherefore your petitioners considering themselves aggrieved by the said order or decree of the said Surrogate for the appointment of the said T. K. who is no wise akin (*or* not the next of kin) to the said children, caused their appeal to be entered with the said Surrogate on the —— day of —— instant, and at the same time filed with the said Surrogate a bond for costs pursuant to the statute in such case made and provided: Wherefore your appellants and petitioners pray that said proceedings in the said matter, and the order or decree of the said Surrogate may be duly transmitted to this court, that the said order or decree may be reversed, and that your appellants and petitioners, or one of them, may be declared and decreed by this court to be entitled to such guardianship, and that it may please this court to make such other and further order therein for notifying the said ——, and for correcting such proceedings(*a*) as the Chancellor may deem just (*b*) (Signed, &c.)

No. 7. *Special Order in the last Case.*

Order on presentment of petition, for opposite party to show cause, and to answer the petition: see final decree in analogous case, *post* No. 9.

The following order on petition of appeal in the case of Morehouse, &c. and Cook, April 8, 1823, was granted by the Chancellor under a former statute,(*c*) which, as to his power to notify the opposite party and correct the proceeding of the Surrogate, is similar to that under the present statute (*d*)

[Caption, &c § 32. p. 78. Title: Morehouse and others, appellants, v. Cook, appellee.] On reading and filing the petition of P. M., L. M., I. B. and A. his wife, bearing date on the 3d day of April instant, setting forth, among other things, that S B. M., late of H. in the county of N., died seized and possessed of a large real and personal estate, leaving two infant children his heirs at law; and that B. C., Esquire, of L. in said county, was on or about the thirtieth day of October, 1822, ap-

(*a*) 2 R. S. 153. § 18. See order founded on a similar petition, *post* No. 9.

(*b*) This petition introducing new facts should be supported by affidavit, or verified in the ordinary manner. See jurat § 8. p. 33. 35.

(*c*) 1 R. L. 454. § 30.

(*d*) 2 R. S. 153. See also 1 J. Ch. 100.

pointed guardian to each of the said infant children, by W. S. Esq. Surrogate of the said county of N.; and further setting forth that the said petitioners, or some of them, are entitled to the said guardianship as the next of kin to the said children; and praying relief and the aid of this court in the premises:—*It is ordered* by the Chancellor, that a copy of the said petition and of this order be served upon the said B. C. within thirty days from the date hereof; and that the said B. C. within thirty days next after such service as aforesaid shall be made, show cause if any he hath against the prayer of the petition, and do cause his answer to the several matters stated in the said petition, to be filed with the Register of this court, and a copy thereof to be served on Green C. Bronson of Vernon in Oneida county, the Solicitor for the said petitioners.(*a*)

No. 8. *Order for return of Transcript and for Time.*

[Caption, title and commencement, § 32. p. 78, &c.] On filing petition, &c. or on motion, &c. it is ordered, that a transcript of all the proceedings in this matter before the said surrogate be made, authenticated and returned to the court of chancery of the state of New-York, and that the time for returning such transcript be extended to the — day of —— next.

(*a*) The further course of proceeding in this case does not appear to be settled; but it might be suggested, that if no answer be put in, move or petition the court, [p. 17. 18.] on affidavit of service and the default [p. 54.] and upon return of the Surrogate, to reverse his order and for appointment of the appellant and petitioner as guardian; and remit said order to the Surrogate for proceedings accordingly. But if the petition be answered, then an application perhaps should be made for a further order if necessary for a reference to a Master to take proofs of the facts, and report his opinion in support of, or in opposition to the claim of guardianship; and upon coming in of the report, the cause may be noticed for hearing on a regular motion day as directed [vol. 1. p. 58-9.] If the transcript of the proceedings of the Surrogate has not been made, an order to enlarge the time if necessary, or a mandatory order on the Surrogate to return his transcript may be applied for prior to the hearing. If the order of the Surrogate be reversed, the decree reversing said order and directing the appointment of the petitioner and appellant, is with the proceedings remitted to the Surrogate, who thereupon will enter an order pursuant to that of the court above, revoking the former, and directing the present appointment.

Form of Transcript.

The people of the state of New-York, by L. S. the grace of God, free and independent: To all to whom these presents shall come, or may concern, send greeting: Know ye, that the annexed are true copies of the testimony, proofs and proceedings, and of the decree or sentence had in the Surrogate's court of our county of ——, in relation to (the settlement of, &c. or appointment of, &c. or whatever the subject matter is,) which remain of record in the office of the Surrogate of said county, and also a true copy of the appeal from the said decree which has been received and remains on file in the said office. In testimony whereof, we have caused the seal of office of our said Surrogate to be hereunto affixed. Witness ——— Esq. Surrogate of our said county, at ——, the — day of ——, in the year, &c. (Signed) ——, Surrogate.

No. 9. *Decree reversing Surrogate's Order, &c.*

Decree on appeal from the surrogate's order granting administration, reversing said order, directing administration to appellants and awarding costs of appeal out of the assets. The form may be adapted to the case of guardian. See No. 6 and 7

[Caption, &c. p. 78. Title: L. M., J. B. and A. his wife, and P. M. appellants, v. B. C. appellee. Case of Morehouse, &c. v. Cook. Decree by the Chancellor. March 31, 1823.] This cause being brought up on appeal from the order and decree of the Surrogate of the county of N. to this court; and the said appeal, and the return thereto, by W. S., Esquire, Surrogate of the said county of N. being read and filed in this court, and the cause brought to a hearing upon such appeal, and argued by Mr. S. Beardsley, of counsel on behalf of the appellants, and by Mr. H. Bleecker, of counsel on behalf of the appellee, and duly considered, it is declared and adjudged, that the right of administration of the goods, chattels, and credits of S. B. M. late of the town of H. in the said county of N. unadministered by E. M. now deceased, and late widow and administratrix of the same, belongs, by law, to the next of kin of the said S. B. M. or some of them who are residents of this state, and of sufficient competence and ability, and willing to accept of the said trust. And it is further declared and adjudged, that from the appeal and the return aforesaid, it appears that L. M. the

mother of the said S. B. M. is his next of kin entitled to administration, and that she is of seventy-seven years of age, and quite feeble, and is therefore deemed not sufficiently competent for the due execution of the trust. And it is further declared and adjudged, that the next of kin after the said L. M. are A. B. wife of I. B. and sister of the said S. B. M. and P. M. a brother of the said S. B. M. and who at the time of the return aforesaid, resided near Pittsburgh, and in the commonwealth of Pennsylvania, and is therefore from non-residence, not a suitable person for the said trust: and no sufficient objection appearing against granting letters of administration *de bonis non* to the said A. B. who appeared before the said Surrogate claiming the same: It is thereupon ordered, &c. that the order and decree of the said Surrogate granting administration as aforesaid, to the apellee, B. C. be reversed, and that the said cause be remanded to the Surrogate of the county of N. and that he grant administration as aforesaid, in due form of law, to the said A. B. and that her husband I. B. if he shall elect so to do, be admitted to join with her in the said administration, provided always, that the said A. B. shall within thirty days from the date of this decree, cause a copy of the same to be served upon the said Surrogate, and shall, within that time, apply to the said Surrogate for administration of the goods, chattels, and credits of S. B. M. deceased, unadministered by E. M. deceased, and shall offer the requisite bond to be executed according to law, by her husband, with two or more sureties, competent in the judgment of the said Surrogate, in a sufficient penalty of not less than $10,000 and in default thereof, that then and in such a case, the administration granted to the apellee, B. C. shall be and hereby is adjudged and decreed to be and remain valid, in like manner as if no such appeal had been had. And it is further ordered, adjudged and decreed, that the taxable costs of the said appeal, and reasonable and moderate counsel fee to be certified as such by the Master, who shall tax the said costs, be allowed to each party in this case, and be paid out of the assets of the said intestate by the administrator or administratrix, who shall act as such in pursuance of this decree.

CHAP. II.

§ 65.
Vol. 1. p. 59-60

First, Appeals *to* circuit Judges from Surrogates; and, *Secondly*, Appeals *from* the decision of circuit Judges, on such appeals, to the Chancellor.

First: No. 1. Appeal to circuit Judge from the decision of Surrogate, *admitting* a will to probate. No. 2. Ditto, *refusing* probate. No. 3. Bond for costs and diligent prosecution. As to Transcript, see *ante*, p. 336. As to further proceedings before circuit judge, see 2. R. S. 66-7. 608-9. *ante* v. 1 p. 59.

Secondly: No. 4. Appeal to the Chancellor from the decision of the circuit judge. No. 5. Bond. No. 6. Petition of Appeal. The Transcript, and

APPEAL TO AND FROM CIRCUIT JUDGES.

No. 1. *Appeal to Circuit Judge from Surrogate admitting a Will to Probate.*

In the matter of proving the will, (*or*, the instrument in writing purporting to be the last will and testament) *of* J. F. late of B. deceased. [See this case, Clarke v. Fisher, 1 Paige, 171. The appeal was to the Chancellor, and the form is now slightly altered and adapted to an appeal to a *circuit judge*. See other cases on probate of wills:—Public administrator, &c. v. Watts, 1 Paige 347. and 4 Wend. 168.

An order or decree in the above matter having been entered in the office of the Surrogate of the county of *Kings* on the *twenty-fifth* day of *February*, one thousand eight hundred and *twenty-eight*, in the words following, to wit, "At a Surrogate's court, held for the county of K. at the Surrogate's office, at F. the twenty-fifth day of February, 1828: present J. L. Surrogate. In the matter, of proving the will of J. F. late of B deceased. The testimony in this cause having been closed by consent of all the parties, that is to say, of D. F. and S. A. W. of the one part, and J. B. C. and P. C. of the other part, and the cause having been argued by Mr. D. S. Jones, and Mr. Jay, of counsel for the said D. F. and S. A. W. and by Mr. W. Kent, and Mr. E. W. King, of counsel for the said J. B. C. and P. C., and after due deliberation thereupon had, it is hereby declared, adjudged, and decreed, and the said Surrogate doth hereby declare, adjudge, and decree, that the paper writing produced and propounded by the said D. F. and S. A. W. as and for the last will and testament of J. F. deceased, is the last will and testament of the said J. F. deceased, and was made and published by him in due form of law, and that the said testator at the time of the executing the said last will and testament was of full age, and sound mind and memory, and was not under any restraint. And it is further ordered and decreed, that the said last will and testament hath been duly proved, and that letters testamentary be thereupon granted to the said D. F. and S. A. W. the executrix and executor therein named. In testimony whereof, I, the said Surrogate, have hereunto set my hand and

L. S. affix my seal of office, the day and year above written (Signed,) J. L.

We, J. B. C. and E. his wife, and P. C. and M. his wife, the said E. and M being the heirs at law and next of kin(*a*) of the said J. F. considering ourselves aggrieved by the said decree, do severally hereby appeal from said decree, and from every part thereof to the Circuit Judge of the ——— circuit, of the State of New-York, and respectfully request that our appeal may be entered accordingly, and that the pleadings, proofs, and proceedings, in the said matter, may be duly transmitted to the said circuit judge of the ——— circuit, and that all further proceedings in said matter before the said Surrogate, may be stayed until the said appeal shall be determined.

Other proceedings are similar to those on appeals from Surrogates. *Ante* § 64.

Date, &c. (Signed,)
W. K., Proctor for Appellants, and
E. W. K., of Counsel for Appellants.

No. 2 *Appeal as before, from Decree refusing Probate.*

In the matter, &c. as before.) An order in the above matter having been duly entered in the office of the Surrogate of the County of Westchester, on the *twenty-first* day of November, in the year of our Lord one thousand eight hundred and twenty-eight, in the words following, to wit :—'This matter having been brought to a final hearing, after due deliberation having been had thereon : It is ordered, adjudged, and decreed, that the instrument, in writing, propounded as the last will and testament of the said M. W. cannot be admitted to probate, and that the application therefore be, and the same is hereby dismissed. (Signed,) J. W. Surrogate.' And J. M. S. who is the devisee, *or*, legatee named in [or executor to(*b*)] the last will and testament of the said M W. deceased, conceiving himself aggrieved by the said order and decree, doth hereby appeal (*as before.*)

Dated, &c. (Signed,)
J. M. S. by A. W. his Proctor,
C. V. S. K. Advocate, and of Counsel, for, &c.

(*a*) 2 R. S. 66 § 55.

(*b*) Qu ? The statute 2. R. S. 66. § 55. gives to a devisee, legatee, heir, or next of kin, an appeal to a *Circuit Judge*. *An Executor* it seems must appeal to the Chancellor. 2 R. S. 600, 610, *ante* v. 1. p. 57. 59.

CHAP. II.

No. 3. *Bond for costs and diligent prosecution of Appeal.*

[See forms § 68. p. 326. § 64, p. 329.] The bond is to the people, &c. penalty $100; and the condition:—Whereas, the said (the appellant,) hath this day, (or lately) filed in the office of the surrogate of ——— an appeal to the circuit judge of the ——— circuit, from the order or decree of said Surrorate, made on, &c. in the matter, &c. admitting, &c. the paper writing purporting, &c. to probate:—now, therefore, &c. if the said ———, shall diligently prosecute his said appeal, and shall pay such costs as shall be taxed against him, in the event of his failure 'to obtain a reversal of the decision so appealed from,'(a) then, &c. (Signed, sealed, and *approved* by the Surrogate, (p. 329.)

No. 4. *Appeal from the Chancellor from the decision of a Circuit Judge on Appeal from Surrogate.*

In the matter, &c. [See forms, p 325, 328.] An order pursuant to the sentence of —— the Circuit Judge of the———circuit being made on an appeal from the order or decree of the Surrogate of ——, in the above entitled matter, between ——, appellant, and —— respondent, on, &c. reversing *or* affirming the said order of said Surrogate, and in the words following, to wit: *(order or sentence of the Circuit Judge;)* which said order has been duly certified by the said circuit Judge to the Surrogate aforesaid, and the papers transmitted on said appeal returned and filed in the office of said Surrogate: And the said ——, who is, &c. [See forms Nos. 1, 2.] feeling himself aggrieved by the sentence of the said Circuit Judge, and the order made in conformity therewith, as aforesaid, doth hereby appeal from, &c. [as in forms *ante* Nos. 1, 2.]

No. 5. *Bond for Costs and Diligent Prosecution of said Appeal.*

[This is similar to No. 3. 2 R. S. 609. § 101. with a variation of the recital in the condition agreeably to the above appeal.]

(a) These words are required by the act to amend the revised statutes, April 20, 1830 (Sess. 53, p. 388) instead of those in 2. R. S. 66. § 56.

No 6. *Petition of appeal to the Chancellor.*

[This, also, is addressed and filed in the same manner as on appeals directly from the Surrogate, *ante*, p. 330–3., and the further proceedings conducted in the same manner, vol. 1, p. 60.]

VICE CHANCELLORS.

The time for appealing, being fifteen days on *interlocutory* orders, is now fixed by statute. Formerly, in appeals from equity judges, the same time being allowed by rule of court, the Chancellor, on sufficient cause, might dispense with the rule, and enlarge the time. But this court only had power to suspend the operation of the rule, and give relief in such a case.(*a*)

§ 66-67, Vol. 1. p. 60-65. Appeals from Vice Chancellors to Chancellor. When and how made.

No. 1. *Notice of appeal.*

No. 1. Notice of appeal to the Register, Assistant Register or Clerk.

In Chancery: Before the Vice Chancellor of the —— circuit.

B. D.
v.
H. T. and W. P.

Take notice, that the complainant hereby appeals to the Chancellor of the State of New-York, from the interlocutory order (*or* decree) of the Vice Chancellor of the —— circuit, made in this cause on the —— day, &c. and entered with the clerk (*or* assistant register *or* register acting as clerk) of said circuit, whereby the plea of the said —— defendant, impleaded with, &c. is allowed with costs: *or* whereby it is ordered, adjudged, and decreed, that it be referred to one of the Masters of the Court of Chancery of this state to take and state an account of the amounts due to the complainants in this cause, and to the defendants, the Mayor, Aldermen and commonalty of the city of New-York, and F. B., jr. upon the several mortgages set forth or referred to in the pleadings in this cause, and the order of priority in which the same ought to be paid; *or*, (where a part only is appealed from) whereby it is adjudged and decreed, that the complainant's bill of complaint be dismissed, and also from all that part of the said decree whereby it is

(*a*) Smith v. Smith, 1 Paige 391.

CHAP. II.

ordered, adjudged and decreed, that the complainant pay to the defendant, the costs of this suit to be taxed (*b*) *or* from all that part of the said decree in the words and figures following, to wit: 'and that the said commissioners do execute to the respective purchasers of said premises, deeds of conveyance,' &c.: [Signed by the Solicitor for appellant; and addressed: To the *Assistant* Register, &c. And also a similar notice to the adverse Solicitor.]

No. 1. *Bond for Costs.*

§ 68. Vol. 1. p. 61. No. 1. Bond or deposit for costs. No. 2. Affidavit of sureties. No. 3. Approval of the register, assistant register, or clerk to be indorsed on the bond.

Know, &c. [usual form, see *ante*. p. 326. 329. 340.] that we ——, (the appellant,) and —— and —— of —— (two sureties,) are held, &c. unto ——, (appellee,) in the sum of one hundred dollars (*c*) lawful money, &c.

Whereas, in a certain cause depending in the court of chancery of the state of New-York, before the Vice Chancellor of the ——— circuit, between the said ——, Complainant, and the said——— impleaded with ———, defendants, an order, (or decree,) was on the ——— day of——, in the year 1830, made and entered in the office of the clerk of said Court in said circuit, from which order the said —— has appealed to the Chancellor: Now, therefore, the condition of this obligation is such, that if the said ———, shall diligently prosecute the said appeal, and shall pay all costs and damages, which shall be awarded against him thereon (*d*) then this obligation to be void, otherwise to remain in full force and virtue. (Signed and sealed.)

Sealed and delivered in the presence of, &c.

(*b*) The decree, or such part of it as relates to costs may be appealed from. (vol. 1. p. 55) See 1 Bligh New R. 639. 3 Peters 319. The English rule is that discretionary costs are not appealable, but statutory costs are. See 1 Bligh, Ib. If the bill be dismissed with costs, and there is an appeal generally from such decree, the defendant may, notwithstanding the appeal sue out, according to the English practice, a *subpœna* for costs, (1 Newl. 659, ed. 1830. 3 Mad. 278.) unless he obtain a special order of the court to stay the proceedings. [*post* § 69.]

(*c*) If a stay of proceedings is also sought, the bond for which may be included in this, the penalty and condition are to be varied accordingly. *post* § 69.

(*d*) If the condition be extended to a stay of proceedings add:— 'And if the appellant failed to prosecute his appeal, or it be dismissed,' &c. see the words of the statute, 2 R. S. 606. *ante* v. 1, p. 62.

No. 2. *Affidavit of Sureties.*(a)

[See commencement of affidavits, § 7. p. 24, &c. No. 3. Joint and several affidavit, p. 29] ——, ss. —— and ——, of, &c. being severally sworn, depose and say, and first this deponent ——, for himself saith, that he is a householder in ——, and is worth the sum of $100, over and above all debts owing and responsibilities assumed by him; and this other deponent ——, for himself, saith that he is also a householder, &c. and is worth, &c. (Signed.)

The above-named, &c. were severally sworn, &c. (See jurat p. 34.]

No. 3. *Approval of the Clerk, &c. indorsed.*

I do hereby approve of —— and ——, as sureties for —— named in and who have executed the within bond. Dated, &c. [Signed by the clerk or other approving officer. Vol. 1. p. 61.]

Bond or other Condition to stay Proceedings.

§ 69. Vol. 1. p. 62. 63. Bond or other terms, to suspend proceedings below. When and how proceedings stayed. Notice of appeal to adverse Solicitor as in form § 66-7.

The bond to stay proceedings in the several cases required by statute, is in the usual form, the penalty and condition being varied to the provisions and language of the statute. (2 R. S. 606. *ante* v. 1. p. 62.) The bond may be included in that for costs. An appeal or re-hearing, does not stop any proceedings on the order or decree appealed from, without the special order of the court,(b) except where a bond or other act is rendered by the statutes a stay of proceedings. Therefore, on a decree of dismissal with costs, an appeal generally to the decree would not prevent proceeding for the costs without such order.(c) And if a special application to stay proceedings, pending an appeal, fails, it generally, almost invariably, fails with costs;(d) however, if the party against whom the decree is attempted to be pro-

(a) This may be submitted to the approving officer, and perhaps previously to the opposite Solicitor for his approbation.

(b) 1 Newl. Pr. 658. 3d ed. 1839.

citing Beam. Cha. Ord. 266. 14 Ves. 585. 17 Ves. 380. 18 Ves. 452.

(d) 16 Ves. 215, 216. cited 1 Newl. 659. 3d ed.

CHAP. II.

secuted, is likely to be put to expense by the proceedings by which the decree is to be carried into effect, the court, in permitting the succeeding party to prosecute the decree, will reserve the consideration, by whom the costs and expenses of these proceedings are to be borne, in case the decree should be reversed.(a) A sale of personal property (as well as real by statute,) in possession may be stayed on ample security.(b) But taking of an account will not be stayed pending an appeal, nor will security for the uncertain result of an account be required.(c) Where pending a suit for specific performance, a bill was filed for the recovery of a considerable part of the estate, in which suit the plea had been overruled, and an appeal was also pending; the court refused to suspend the Master's report on the title until such appeal was decided: the exceptions and the plea might be heard together.(d) But pending an appeal from an order overruling a demurrer, the court will stay proceedings for enforcing an answer where an answer would render the appeal useless.(e) It has been held in England, that pending an appeal, application must be to the superior court for staying proceedings founded on the order appealed from. The inferior court cannot interpose any delay in the execution of the decree.(f) But here on appeals from chancery to the court of errors, the practice of the former, as recognized and sanctioned by the latter,(g) has been to direct the terms on which

(a) 1 Newl. ib.

(b) 2 Russ. 56. The following order was granted by the Chancellor (in Eng.) on staying, pending an appeal, a sale of premises and personals, viz. Upon the defendants depositing upon oath all the title deeds of the house and premises called ——, in the office of the Master, as a security to abide the result of this suit, and upon the defendant ——, and —— and ——, as her Solicitors, entering into a proper security to be approved of by the Master, for the value of the said goods, plate, linen, china, stock in trade, and other effects in and about the said house and premises, in the sum of ——, the Chancellor doth order that the sale of the said house and premises, and of the household goods, &c. be suspended until the hearing of the appeal, and it is ordered, that the defendant ——, do pay unto the plaintiff the costs of and attendant upon the order, bearing date, &c. and all proceedings under it, and of and under this application. 2 Russ, 56. 59.

(c) 2 Russ. 56.

(d) 2 Jac. and W. 539.

(e) 1 Jac. and W. 636.

(f) 1 Jac. and Walk. 48. 5 Price 468.

(g) 2 Wend. 205. 208.

the appeal should operate as a stay of proceedings. The language of the statute contemplates the application for that purpose when necessary to the court below, (*ante* v. 1. p. 62-3.) and as the same provisions are adapted (*a*) on appeals from Vice-Chancellors, application it seems might, and perhaps should in the first instance, be to the former. This on appeal in the same court, appears to have been the course of the English practice. In these cases, where the decree appealed from was not pronounced by the judge to whom the application was made, it was necessary to state the objections made to the decree; and therefore it was impossible, upon hearing the motion, to avoid going, in a great degree, into the merits of the case.(*b*) This inconvenience originated one of the recent general orders of the English court, requiring every such application to be made first to the judge who pronounced the decree or order. This application has usually been by motion, though in ordinary cases of applying to stay proceedings in causes in this court, it must be by petition.(*c*)

§ 70. Vol. 1. p. 63-65 *Notice of Appeal* for adverse Solicitor, same as *ante* p. 341. see note *post. Preparations* for hearing, &c.

No. 1. *Notice of Hearing on the Appeal for a regular Term.*

No. 1. *Notice of hearing* on appeal for Term.

In Chancery.

E. S. Appellant,
v.
D. M. who is impleaded with, &c. Respondents.

[See p. 42.] Take notice, that I shall bring on this cause(*d*) to hearing upon the argument of the appeal therein, at the next stated term of this court, to be held at the *capitol* [see terms, vol. 1. p. 27. see *ante* p. 42.] in the city of *Albany*, on the fourth Monday of *January* next, at the opening of the court on that day, or as soon thereafter as counsel can be heard. Dated this 14th day of November, 1830.

Your's, &c.
G. W. S. Solicitor for Respondent, D. M.

To J. S. Esq. Solicitor for Appellant.

No. 2. Notice of argument of appeal on interlocutory orders on a motion day, or for first or subsequent

(*a*) R. 116.
(*b*) 17 Ves. cited 1 Newl. 661. ed. 1830.
(*c*) 2 Paige 26.
(*d*) If the appeal is from the whole decree it is regularly opened as a cause. *Ante* § 62. n. (a)

CHAP. II.

Monday in term.

Note of Issue when appeal is placed on calendar. See form p. 305.

Affidavit of service of notice, see form p. 55.

Hearing or *Argument*.

Affirmance or reversal.

No. 3. Form of decree of reversal of interlocutory decree of Vice Chancellor refusing to dissolve injunction: see another, (1 Hopk. 469.) that the proceedings stay till the complainants exhaust their remedy against that portion of the fund situate in another state mortgaged to

No. 2. *Notice for a Motion Day on an Appeal from an Interlocutory Order.*

(Title.) Take notice, that I intend to bring on the appeal to the interlocutory order of the Vice-Chancellor of the ——— circuit, made on, &c. to be argued before the Chancellor, at the *City Hall* of the city of *New-York*, on the *third* Tuesday [or, *fourth Monday*, if for the 1st day of term] of *October* instant (see motion days, vol 1. p. 27.) at the opening of the court, &c. (as before). Dated New-York, October 5th, 1830.

Your's, &c.
C. G. Solicitor for Appellants.

To G. W. S Esq Solicitor for Respondents.

In case of cross appeal, brought on at same time with the original appeal, the party whose appeal represents him to be most aggrieved by the decree, should begin.(*a*) The question of affirmance, or reversal, on an appeal from an interlocutory order, would, it seems, depend on the facts before the Vice-Chancellor; and hence subsequent affidavits *ex parte* would be inadmissible. [See § 62. p. 323] Whether, in any case, new proofs may be admitted, is not decided. But the relation which the Vice-Chancellors bear to the Chancellor under the revised statutes is substantially the same as that which the Master of the Rolls and Vice-Chancellor in England, bear to the Chancellor there,(*b*) and on an appeal from the rolls or the Vice-Chancellor, which is considered in the light of a re-hearing merely, new proofs are admissible if a proper foundation be laid for their introduction,(*c*) as in the case of re-hearing [*ante*

(*a*) 3 Swanst. 146.

(*b*) 2 Paige 94.

(*c*) Russ 91. The appeal is only a re-hearing. The Vice-Chancellor when he hears a cause, hears it for the Chancellor. (ib.) On appeal from the rolls the cause is open, and the party may read new proofs and offer what he can against the decree; (1 Grant 242. ed. of 1829. citing Pre. Cha. 496) and in some cases the party appealing has been allowed to go into fresh evidence; (1 Newl. 662. ed. of 1830. citing 10 Ves. 237. 1 Ves. and B. 153. sed. vid. 1 Mer. 35.) but he must give up his deposit (1 Newl. ib. c. 2. Atk. 408. This is quered by Grant, ib.) and Lord Eldon observes (1 Ves. and B 151. cit. 1 Newl, ib.) that it comes to a question of costs; and the rule should be laid down, that you may add to testimony upon an appeal; still the party, if he succeeds, ought to indemnify the

them which was not mortgaged to another creditor.

p. 307. n.] perhaps by a special application to the court supported by affidavit and due notice. For the Chancellor is here empowered by statute to make new orders, and dispose of the whole subject himself. [Vol. 1. p. 64. see *ante* § 62. p. 323.]

No. 3. *Decree of Reversal on Appeal, dissolving Injunction.*

In Chancery.

W. J., R. K., J. B., &c. Appellants,
v.
J. R., Respondent.

On appeal from the interlocutory decree of the Vice-Chancellor of the ——— circuit. [Caption § 32. p. 78. This was on an appeal from the late equity court, third circuit: see the case Jerome v. Ross, 7 Johns. Ch. 315.]

The cause having been brought to a hearing upon the appeal, and argued by Mr. Viele, on behalf of the appellant, and by Mr. Mitchell, Mr. Buel, and Mr Cushman, on behalf of the respondent, and the case being duly considered; It is is ordered, &c. that the interlocutory decree appealed from be reversed, and that the injunction granted by the (Vice-Chancellor) of the ——— circuit, in favor of the respondent, S. R. against the said appellants be dissolved, and that the cause be remanded, to the end that such further proceedings be had upon the bill in the court below, as shall be just.

other for not having that evidence at the time it ought to have been read. On appeal the whole case is open; but on re-hearing, so much only as was petitioned against and to those only who petition; (Grant ib c. Harr. 343) Upon re hearing of a cause which was originally heard before the Chancellor, it must be opened as a case, (1 Newl. ib. c. 2 Atk. 49.) and in an appeal from the whole decree. it is regularly opened as a cause, (1 Newl. ib. c. Sel. Ca. Cha. 13-14.

CHAP. II.

§ 73.

V. 1. p. 65-66. No. 1. Notice of appeal from the whole of the decree. No 2. Another form. No 3. Notice of appeal from specified parts of the decree. See other notices *ante* § 67. No. 4. *Certificate* of deposit or of bond. *Bonds* for costs, or to stay proceedings. See similar forms, *ante* § 68, 69. and vol. 1. p. 66.69.

APPEAL TO THE COURT OF ERRORS.

No. 1. *Notice of Appeal.*

In Chancery:

G. W.
v.
J. L.

Take notice that the defendant hereby appeals from the decree pronounced (*or* order) made in this cause by the Chancellor [*or* by the Vice Chancellor of—— acting as Chancellor, the Chancellor being a party or interested; or from an order of the Vice Chancellor of —— made in said cause on, &c. pursuant to an order of the Chancellor made on, &c. upon an appeal to him from a former order of the said Vice Chancellor made in said cause] on the —— day of, &c. and entered with the *Assistant* Register of this court, and from every part of said decree *or* order, to the court *for the* correction of errors(*a*) before the president of the senate, the senators and justices of the supreme court. Dated, &c. [signed by the Solicitor for appellant, addressed to the Register, &c. in whose office the order is entered, and a like notice addressed to the adverse Solicitor to whom also it may perhaps be advisable to superadd notice that the deposit, bond for costs, and bond to stay proceedings or other act required by the statute, has been made, approved and filed, as the case may be, with the proper officer of the court]

No. 2. *Another Form Specifying the Decree.*

(Title of cause, see Murray and Coster 20 J. 576. 5 J. Ch. 522. 7. J. Ch. 127.) Take notice that the defendant hereby appeals (or if the notice be to the adverse Solicitor 'that the defendant has appealed and doth appeal') to the court for ('The trial of impeach-

(*a*) Or 'to the court for the trial of impeachments and correction of errors.' See note to petition of appeal, *post.* p. 350.

ments and) the correction of errors from the whole of the decree or decretal order made in this cause on, &c. and entered with the Register of this court, whereby it is ordered, adjudged and decreed that the exceptions taken on the part of the defendants to the Master's report be dissallowed, and overruled, and that the defendants fully, and perfectly answer the complainants bill, by putting in a full and perfect answer to the six first exceptions taken on the part of the complainants' to the answer of the defendants, and allowed by the Master within *three weeks* after service of a copy of the said order upon the Solicitor for the defendants, or that so much of the said bill as is covered by the said exceptions be taken pro confesso. And by which said decree or decretal order, it is ordered that the said Master on the application of the complainants' Solicitor strike out that part of the answer on file reported by him to be irrelevant and impertinent—And whereby it is ordered that the defendants pay to the complainants the costs of the exceptions taken to the answer, and of the reference, and of the argument upon the exceptions taken to the said report. Dated, &c.

No. 3. *Notice of Appeal from Specified parts of a Decree.*

(Title : T. B. v. J. I. C. and J 'C. who are impleaded with J. F. R. and J. L. jun. Case of Coddington and Bay, 20 Johns 637. on appeal from, and affirmance of, 5 J. Ch. 54.] Take notice that J. I. C. and J. C. two of the defendants in the above cause hereby appeal to the court for the (trial of impeachments and the) correction of errors from all that part of the decree [see the decree 5 J. Ch. 59.] made in the above cause on, &c. and entered with the Register of this court, whereby it is declared that the defendants J. I. C. and J. C. are not entitled to the notes in the pleadings mentioned as received by the defendants J. F R. and J. S jun. on account of the sale of the Schooner Express belonging to the complainant, and by the said J. F. R. and J. S. jun. transferred to the said J. I C. and J. C. on or about the, &c. nor to the value, amount or proceeds of the said notes as against the complainant; and also from all that part of the said decree whereby it is ordered

CHAP. II.

adjudged and decreed that it be referred to one of the Masters of this court to compute the amount of the said notes, with interest thereon, from the times they were respectively payable to the date of the report, and that all the said defendants in the said amended bill, or some or one of them pay to the complainants the sum that shall be reported as the amount of the said notes with interest as aforesaid, within thirty days after the Master shall have made, and filed his report, and notice thereof, and of this decree or that the complainant have execution therefor against all, or any, or either of the said defendants according to the course, and practice of the court, and also from all that part of the said decree whereby it is ordered that no costs be taxed or allowed to the complainant, or to the defendants J. I. C. and J. C. as against each other. Dated, &c.

No. 4. *Certificate of Deposit, or of Bond filed.*

(Title.) I certify, that the defendant ——, in this cause, has this day deposited, by G. W. S. Esq. his Solicitor, two hundred and fifty dollars in court, in my hands, on filing notice of appeal in the above cause. Dated, &c. or that a bond (in lieu of such deposit) duly executed, in the penalty and with condition required by statute, and approved by me, has been this day filed, &c.

No. 1. *Petition of Appeal to specified parts of a Decree.*

§ 74. Vol. 1. p. 67-69. Petition of appeal, deposit and bonds. No. 1. Petition on appeal from specified parts of a decree. No 2. Ditto from order overruling exceptions to

In the court for (the Trial of Impeachments and) the Correction of Errors:

J. I. C. and J. C. who are impleaded with J. F. R. and J. S. junior, appellants,
vs.
T. B. respondent, (see case p. 349.)

To the President of the Senate, the Senators, and Justices of the Supreme Court of Judicature of the State of New-York, in the court for (the trial of Impeachments and) the Correction of Errors.(a)

(a) The petition of appeal should strictly, perhaps, be directed to the court for the correction of Errors only. The court when on trial of impeachments take a different oath from that when sitting as a court for correction of Errors.

The petition and appeal of J. I. C. and J. C. two of the defendants in the court below, in the above entitled cause, and the appellants herein, respectfully show,

That they do hereby appeal to this court for the (trial of Impeachments and the) correction of Errors, from all that part of the decree made by the court of chancery of the state of New-York, on the — day of ——, in the year of our Lord one thousand eight hundred and ——, in a certain cause therein depending, wherein the above-named respondent was complainant, and these appellants and petitioners, together with the above named J. F R and J. S. junior, were defendants, and entered with the Register of the said court of chancery, whereby it was and is declared, that these appellants and petitioners are not entitled to the notes in the pleadings in the said cause, in the said court of chancery, mentioned as received by the said J. F. R. and J. S. junior, on account of the sale of the schooner Express, belonging to the above-named respondent, and by the said J. F. R. and J. S. junior, transferred to these appellants and petitioners, on or about the — day of ——, in the year of our Lord one thousand eight hundred and ——, nor to the value, amount or proceeds of the said notes, as against the said respondent; and also from all that part of the said decree whereby it was and is ordered, adjudged and decreed, that it be referred to one of the Masters of the said court of chancery to compute the amount of the said notes, with interest thereon, from the times they were respectively payable to the date of the report, and that all the said defendants in the said cause, in the said court of chancery, in the amended bill therein exhibited, or some or one of them pay to the said respondent the sum that should be reported as the amount of the said notes, with interest as aforesaid, within thirty days after the Master should have made and filed his report and notice thereof and of the said decree, or that the said respondent have execution therefor, against all, or any, or either of the said defendants, according to the course and practice of the said court of chancery; and also from all that part of the said decree whereby it was, and is ordered, that no costs be taxed or allowed to the said respondent, or

report on exceptions to answer. *See* form of do. on exceptions to report on taking accounts. Bla. 186. No. 3. Ditto from decree of dismissal, after an order denying production of letters, &c. No. 4. Ditto on decree of chancellor on appeal from decree of surrogate, after an appeal to a circuit judge.

CHAP. II. to these appellants and petitioners, as against each other. In which several particulars herein before specified, these appellants and petitioners humbly conceive that the said decree is erroneous, and ought to be reversed or modified. Wherefore these appellants and petitioners respectfully pray, that the said decree so appealed from, may be sent to this court for the (trial of Impeachments and) correction of Errors, without delay (if in session,) *or* (if in vacation,) on the first day of the next session thereof, [see v. 1. p. 68-70.] and that the same may be reversed or modified in the several particulars herein before specified, and that such other decree may be made therein by this court, as shall be agreeable to equity and good conscience, whereby these appellants and petitioners may be restored to all things which they have unjustly lost in and by the said decree. And these appellants and petitioners, as in duty bound, shall ever pray, &c.

G. W. S., Solicitor for the appellants.
G. G., of counsel for the appellants.(*a*)

The preceding petition, which is given as a *form* merely, [the decree below in that case having been affirmed,] (*b*) is deemed sufficiently comprehensive within the rules of the court of Errors.(*c*) The *case* which is to be prepared for the court, [*post* § 77.] renders a detail of the proceedings and merits of the appeal unnecessary in the petition. In England, the petition sets forth the case as in the original bill; states the filing of the bill and the time; replication and cause at issue; examination of witnesses; hearing; then the reason admitted by the answer, and for which the appeal is made; then the Chancellor's decree, notwithstanding such admission, and all subsequent proceedings, shortly, if any: then the petitioners being advised of the erroneousness of the decree, and his appeal thereupon, praying 'their lordships summons' to defendant to put in his answer to the appeal, at a time to be fixed, in order

(*a*) The signature of one counsel is sufficient, and but one fee for such only, is taxable. 2 Paige 185. 189.

(*b*) 20 Johns. 637.

(*c*) See those rules as adopted in 1817. V. 1. p. 67, &c. and republished in 9 Cowen, 287, &c.

that they may hear the cause and may reverse the decree (and subsequent orders), and concluding in the usual style; signed, first by the appellant, and then by two counsel.(a) But here the petition sets forth the decree, without reciting the pleadings, states that the decree or some part specified, is erroneous, and ought to be reversed or modified. [Vol. 1. p. 67.] The rule does not appear to preclude an allusion to the progress of proceedings, but such allusion should be brief and introductory to the order or decree appealed from, as in the following forms:

No. 2. *Petition of Appeal from an Order overruling exceptions to Report on exceptions to Answer.*

See form of petition on appeal (under former rules of court of Errors) from an order overruling exceptions to a master's report on taking an account. Blake 188.

[Title as in No. 1: In the court for, &c. Between J. B. M., &c. appellants, and J. G. C., &c. respondents. See the case Murray and Coster. See 20 Johns. 526. 576. 603. 5 J. Ch. 522. 7 J. Ch. 127.]

To the President of the Senate, &c. (address as in No. 1.)

The petition and appeal of the above-named appellants respectfully showeth, that on or about the twenty-fourth day of June, A. D. 1823, the said respondents exhibited their bill in the court of chancery, in this state, to be relieved concerning certain matters therein complained of; that your petitioners filed their answer to the said bill of complaint; that the said respondents filed certain exceptions to the said answer, which were allowed by a Master of the court of chancery, to whom the same were referred at the instance of the respondents, and that your petitioners filed certain exceptions to the report of the said Master. Your petitioners further show, that the said cause having been brought to a hearing before the Chancellor, at the —— term of the said court, in the year, &c. (1823,) a certain decree or decretal order was made on the third day of May, in the said year, whereby it was ordered, adjudged and

(a) 1 Grant, 2d ed. 243. Form of English petition, 2 ib. and 2 Newl. 3d ed.

CHAP. II.

decreed, that the exceptions taken on the part of your petitioners to the Master's report be disallowed and overruled, and that the defendants fully and perfectly answer the complainants' bill, by putting in a full and perfect answer to the first six exceptions taken on the part of the respondents to the answer of your petitioners, within three weeks after service of a copy of the said order upon the Solicitor for your petitioners, or that so much of the bill as is covered by the said exceptions be taken *pro confesso*; and whereby it was further ordered, that the said Master, on the application of the Solicitor of the respondents, strike out that part of the answer on file reported by him to be irrelevant and impertinent, and that your petitioners pay to the respondents the costs of the exceptions taken to the said answer, and also, of the argument upon the exceptions taken to the said report. And your petitioners being advised that the whole of the said decretal order is erroneous, appeal from the whole thereof. And your petitioners pray, that a short day may be assigned for the respondents to answer all and singular the premises before this court, and that the said decree may be wholly reversed, with costs, or such other relief granted, as to this court shall seem meet, and your petitioners will ever pray.

R. S., Solicitor.
J. O. H., of counsel.

No. 3. *Petition of Appeal from Decree of Dismissal, after an application for production of letters, &c.*

[Title and address as before. Case of Dyett, appellant, vs. Lenox, respondent, see *post* § 77.]

The petition of appeal of the above-named appellant, respectfully shows,

That on the ninth day of May, in the year of our Lord eighteen hundred and twenty-two, your petitioner exhibited in the court of chancery of the state of New-York, his bill of complaint against the respondent above named, to be relieved touching certain matters therein stated; which bill was afterwards amended by sundry additions thereto duly made: and to the said bill of com-

plaint the respondent filed his answer in the said court, and the cause was thereupon put at issue by a replication. And your petitioner further shows, that on the fifth day of January, eighteen hundred and twenty-four, your petitioner, previous to the hearing of the said cause, presented to the said court of chancery, a petition setting forth certain matters therein contained, and praying that the respondent might be required to deposit certain letters and copies of letters, therein specified, with the assistant register of the said court, to the end that the same might be inspected by your petitioner or his counsel, which petition, by an order of the said court thereupon made, was denied, with costs to be paid by your petitioner: And which order, as your petitioner is advised, was wholly erroneous, and your petitioner was thereby compelled to go to hearing in the said cause under material disadvantage. And your petitioner further shows, that the said cause having been afterwards brought to a hearing before the Chancellor in May term of the said court in the year of our Lord eighteen hundred and twenty-five, a certain decree was made therein by the Chancellor, on the sixteenth day of July, in the year last mentioned, whereby it was ordered, adjudged and decreed, in substance, that your petitioner's bill of complaint in the said cause be dismissed with costs, to be paid by your petitioner. And your petitioner being advised that the said decree is erroneous in the whole extent and meaning thereof, has entered his appeal therefrom in the said cause to this court.

Your petitioner therefore prays, that the respondent may answer the premises by some short day to be appointed by this court, and that the said decree of the sixteenth of July, eighteen hundred and twenty-five, may be reversed, with costs; and that your petitioner may have such further and other relief in the premises, as to this court shall seem meet to be granted.

And your petitioner will ever pray, &c.

H. W. W., Solicitor, and of counsel for appellant.
D. B. O., of counsel.

CHAP. II.

No. 4. *Petition of Appeal from the Chancellor's Decree on appeal from Surrogate after an Appeal to a Circuit Judge.*(a)

[Title and address as in No. 1. Between —— Appellants and —— Respondent.] The petition &c. Respectfully showeth: That on, &c. in the year, &c. [briefly state the proceedings before the surrogate as *in ante* § 64. p. 327. according to the nature of the proceeding, or if it be the allowance, &c. of probate of will, then as follows,] the appellant deposited in the office of the surrogate of, &c, an instrument in writing, and propounded the same as the last will and testament of ——, late of said city, then lately deceased, and claimed letters testamentary thereof: which said instrument (in the proper hand writing of the decedent,(b) was in the words and figures following, to wit: [copy of will] That thereupon, the said appellants and the said respondent, by their respective counsel and proctors, on, &c. appeared before the said surrogate, who by successive adjournments, proceeded to take proofs and examinations in support of, and in opposition to the instrument in writing so propounded, as aforesaid: That on, &c. then following, a caveat was entered by —— of the said city, against proving said instrument, who on, &c presented his petition, wherein he represented himself [next of kin, to wit, the son, brother, &c.(c)] That thereupon a citation was issued by the said surrogate to the said —— who appeared by his proctor and counsel, and contested the validity of the instrument in question. That on, &c. the proofs and examinations in the matter aforesaid, having

(a) The following form is drawn principally from that in the case of Watts and Le Roy, executors, &c. v. The public administrator, &c. see the case 1 Paige 347. and 4 Wend. 168. That however, was an appeal directly to and from the Chancellor, and in cases still of appeal *by executors*, it seems, that as the statute has made no provision for such appeal to a circuit judge, it must be to the Chancellor.

(b) This was the case of Leake. The will was in his hand writing, but not signed. Now by statute no such will is valid, 4 Wend. 168.

(c) 'Nearer of kin to, &c. than any other person residing in the United States,' was the allegation in the Leake case 1 Paige. 347. This was evasive and so considered in the result of that case. The averment of relationship, in order to entitle a person to contest the will, should be direct and specific.

been closed, the said surrogate, upon mature deliberation, did solemnly make and publish an order, judgment, and decree, whereby it was ordered, adjudged, and decreed, that the instrument in writing, propounded as the last will and testament of the said —— be admitted to probate, and that letters testamentary issue thereon. That after this order, judgment, and decree, was made, and served, on the proctors of the parties, to wit, on, &c. the said —— did cause his appeal, from the said order and decree to be filed in the office of the said surrogate; wherein he, the said —— did appeal from every part of the said decree to, &c. (the circuit judge of the —— circuit, *or to the Chancellor as the case may be*) and prayed this, his appeal might be entered accordingly, and that the pleadings, proofs, and proceedings in the said matter, might be duly transmitted to, &c. (the court of chancery *or* to the said circuit judge) in order that the said (court *or* circuit judge) might proceed upon the said appeal, and do therein what should appertain to law and justice: That on, &c. the aid respondent(*d*) caused a similar appeal to be entered on his behalf: That thereupon [if the appeal is to the Chancellor, say:] in the —— term of the court of chancery, the matter of the said appeals having been brought to a hearing, and argued upon the testimony, proofs, and proceedings, aforesaid, a decree was made by the Chancellor on, &c. whereof the following is a copy [in the Leake case the decree of the Chancellor reversed that of the surrogate, and directed letters of administration to be granted to the public administrator one of the appellants in the court below, and respondent in the court of errors. In a case of appeal, first to a circuit judge, then to the Chancellor, and then to the court of errors, see § 65. p. 338. state the prior appeal to the circuit judge, his sentence and order as certified to the Surrogate, the Surrogate's decree thereupon, and the appeal thence to the Chancellor; as for example,

(*d*) In the case of Leake the public administrator was the respondent, claiming administration on the ground that the supposed testator died without next of kin capable of inheriting, and that the supposed will not being signed was invalid. The court of errors ultimately decided that the will was good, and the appellants prevailed. See 4 Wend. 168.

CHAP. II.

instead of the foregoing clause, say: That thereupon such proceedings were had before the said circuit judge that at, &c. on, &c. the said matter was brought to a hearing, and argued upon the testimony, proofs, and proceedings aforesaid, before the said circuit judge, who on, &c. duly certified to the said surrogate, his sentence in the said matter reversing the order of the surrogate aforesaid, in the words following, &c. That thereupon the said surrogate on, &c. made his final order or decree in pursuance of the sentence and order of said circuit judge, in the words following, &c. That on, &c. Your petitioners caused their appeal from the whole order or decree of the said Surrogate made in conformity to the sentence of the said judge, and from the said sentence, order, and determination of said circuit judge, to be duly entered in the office of the said Surrogate, pursuant to the revised statutes in this case provided, and thereby appealed to the Chancellor of the state of New-York: That thereupon, in —— term, &c. (as before) a decree of affirmance was made by the Chancellor, on, &c in words following, to wit, &c.]

And your petitioners are advised that the whole of the said sentence, order, or decree, so made by the Chancellor is erroneous, except so far as the same sentence, order, or decree respects the said ——, [of whom it was in and thereby declared, adjudged, and decreed, that the said ——— is not next of kin to the said ———, that he is not interested in the personal estate of the said —— deceased; and is not entitled to the administration thereof.]

Your petitioners therefore appeal from the whole of the sentence, order, or decree last aforesaid, except so far as the same respects the said ——, and pray that a short day may be appointed for the respondent to answer all and singular the premises before this court, and that the whole of the said sentence, order, or decree of the Chancellor, except as aforesaid, may be reversed with costs, or such other relief granted to your petitioners, as to this court shall seem meet. Dated, &c.

P. A. J. Solicitor for Appellants,
S. A. F. } Counsel for Appellants.(a)
J. V. H }

(a) Signature of one counsel is sufficient.

§ 75.

Vol. 1. p. 69. Proceedings, Transcript, and return of Petition; order to answer *post.*

Leave the petition with the *Assistant* Register, &c. who will annex to it a transcript of the decree and minutes, and on request prepare copies duly authenticated [see p. 32-33.] of such of the pleadings, proofs, and exhibits returned to his office, as either party wishes, in order to make up his case, or relies on to produce at the hearing [vol. 1. p. 69]. The petition, with its annexed transcript and minutes, are returned and filed with the Clerk of the Court of Errors, who (in vacation provided the return day has elapsed) will, on receiving a written request, enter the common order to answer and furnish a certified copy for service.

An appeal in which the essential parties are not served with the preliminary order to answer and do not appear at the hearing, cannot proceed as against one of the respondents.(*a*)

§ 76.

Vol. 1. p. 70. Proceedings prior to argument: No. 1. Caption and title to orders &c. No. 2. Common order to answer, certified. No. 3. Notice to annex & to serve on adverse party, with copy of petition and copy of order to answer. Affidavit of service, &c. see *ante* p. 54. 87. No. 4. Decree of reversal on default in not answering. No. 5. Order after remittitur to set aside the de-

No. 1. *Caption and Title to Orders and Decrees in the Court of Errors.*

At a court for the correction of errors, held at the capitol, in the city of Albany, on *Thursday*, the ——— day of *December*, in the year of our Lord one thousand eight hundred and thirty:

Present —— Lieutenant Governor (or, —— President pro. tem.) and *seventeen* Senators.

Mr. Chancellor Walworth.
" Chief Justice Savage.
" Justice Sutherland.
" Justice Marcy.

——— Appellants,
vs.
——— Respondents.

or,

——— Respondents,
ads.
——— Appellants.

No. 2. *Common Order to Answer the Petition.*

[Caption and title as above: but the caption is usually omitted in *common* orders, and the *date* merely substituted.] On reading and filing the petition of appeal

(*a*) 3 Bligh (P.) Rep. 193.

CHAP. II.

fault for irregularity with costs. Respondents' proceedings. As to notice of all special motions and service of copies of papers on which they are founded, see vol. 1. p. 71.

of the above-named appellant, with copies of the decretal order and minutes of the court of chancery thereto annexed, and on motion of Mr. ——, of counsel for the appellant, It is ordered, that the respondent file his answer to the said petition in eight days after service of a copy thereof, and of this order, or in default thereof, that the respondents be precluded from answering the same. A copy, J. F. BACON, Clerk.

No. 6. Order of course that appellant file petition of appeal.

No. 7. Notice of said order with copy, & of a future motion that appellant be precluded.

No. 3. *Notice to Serve with Petition and Copy of Order to Answer.*

(Title of cause.)

Sir,—Please to take notice, that the within are copies severally of the petition of appeal filed in the within mentioned cause and of the order obtained thereon, that the respondents answer said petition within eight days after service of a copy of said order, or be precluded.

(Dated, signed by Solicitor, and addressed to opposite Solicitor.)

No. 8. Decree of dismissal thereon, for not filing petition &c.

No. 4. *Decree of Reversal on Default in not Answering.*

[Chamberlain v. Fitch, April 2, 1823.] On reading and filing a copy of the petition of appeal in this cause, and order, notice and admission of service on J. B. G. Esq Solicitor for the respondent, together with the Clerk's certificate that no answer to the petition of appeal had been filed, and the respondent not having complied with the said order of this court; on motion of Mr. C. of counsel for the appellants—It is ordered, adjudged, and decreed, that the order of the court of chancery, dissolving the injunction in this cause, be reversed: And it is further ordered, &c. that the injunction be continued until the hearing; and that the record be remitted to the court of chancery, to the end that this decree may be executed.

No. 9. Order by consent for time to file petition and transcripts, and in default for dismissal *nunc pro tunc*

No. 10 Order *after appeal filed* for dismissal by consent of husband of appellant (she having married pending appeal) and the respon-

No. 5. *Order after Remittitur(a) to set aside the above default for irregularity, with Costs.*

[Chamberlain v. Fitch, September 13th, 1823. On reading affidavits and papers accompanying, and hearing

(a) If the cause be *regularly* remitted, the court has no jurisdiction, 4 Wend. 188. See remittitur, *post* § 79.

the counsel of the parties; Ordered, that the default obtained against the respondent, for not answering the petition of appeal filed in this court be set aside, with the costs of this application; and further, that the Register of the court of chancery return to this court the papers, rules, orders and decree relating to the appeal, which were remitted by this court, on obtaining the said default, and that the respondent thereupon answer the said appeal: provided, nevertheless, that the preceding order shall not take effect until S. S. and J. B. G. Esqrs. attorneys for the respondents in the suit of law mentioned in the said affidavits and papers, shall have executed and delivered to the Solicitor for the appellants, a stipulation, that, if the order of the court of chancery shall be reversed on the said appeal, that then, and in that case, they will deposit in the court of chancery to the credit of this cause, the amount of money received by them from the sheriff of the county of W. on the execution issued on the judgment at law, and mentioned in the said affidavits and papers, subject to the disposition of the Chancellor.

dent.

No. 11. Order for dismissal of part of the appeal.

No. 12. Order of dismissal without costs to either.

No. 13. Order to postpone motion on petition for dismissal.

No. 14. Order to dismiss with costs, but without prejudice, for want of prosecution.

No. 15. Order quashing appeal for irregularity, but without prejudice.

No. 16. Order to prosecute appeal in *forma pauperis*.

Respondent's proceedings.

No. 6. *Order of course that Appellant file Petition of Appeal.*

[Caption, as in No. 1.] On filing a written request of Mr. — of counsel for the respondents, and on motion of Mr. —— aforesaid: Ordered, that the appellant file his petition of appeal in this court, together with the transcript of the record, and copy of the minutes, in eight days after service of a copy of this order, or that he be precluded, and lose the benefit of such appeal. [The above it seems, is all that the rules of this court contemplate, *ante* vol. 1. p. 70. But the form of such order as appears from the minutes of the court of errors, is quite unsettled. The order sometimes varies as follows:] On filing notice of an appeal received in this cause, *or* affidavits, &c. *or* notice of appeal and certificate of the Clerk of this court, that no petition of appeal has been filed in this court in this cause, *or* on reading and filing the certificate of the *assistant* Register of the court of chancery, whereby it appears that notice of an appeal from a decretal order of said court, made in this cause, has been filed by ——, but that no petition of appeal

CHAP. II.

has yet been filed, and on motion, &c. ordered, that the appellant file his petition of appeal in this court, *or* that the said ——— file his petition of appeal to this court with the *Assistant* Register, and also cause the same to be brought into this court and filed, together with the transcript of the proceedings, in eight days after service of a copy of this order, *or* that the appellants do *bring* into this court, and file with the clerk thereof, *within* eight days after service of notice of this rule, their petition of appeal aforesaid, with the matters required to be annexed to the same, according to the rules and practice of this court, or in default thereof, that they be precluded, and lose the benefit of the said appeal, *or* that he be procluded, *or* that the appeal be dismissed, *or* that such petition of appeal be not received.

No. 7. *Notice of said Order and of a future Motion that Appellant be precluded with Costs.*

[Title of cause: In the court for the correction of errors, —— Respondents, ads. —— Appellants.]

Sir,—Please to take notice, that a rule, of which the above is a copy, has been duly entered in this cause, requiring the appellants to bring into this court and file with the Clerk thereof, within eight days after service of notice [or copy] of said rule, their petition of appeal, with the matters to be annexed to the same, according to the rules and practice of this court, or, in default thereof, be precluded and lose the benefit of such appeal: And further take notice, that if the appellants shall make default in complying with the exigency of the said rule, I will move this court, on Monday, the —— day of September instant, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for an order that the appellants be precluded and lose the benefit of their petition of appeal, and for costs, or for such other or further order in the premises, as the court shall see fit to grant. Dated, &c.

(Signed by Solicitor for respondents; addressed to Solicitor for appellants. Make out your affidavit of service [see p. 54. 87.] annex it to the duplicate notice and certified order, and obtain a certificate that no appeal is filed and move as follows:)

No. 8. *Decree of Dismissal for not filing Appeal.*

[Caption, &c. as in No. 1. Roosevelt ads. Lott, &c. February 18, 1828.] The appellant ——, not having caused his petition of appeal to be brought into and filed in this court, as directed by a former order made in this cause, and the said order, as appears by the affidavit of ——, having been duly served, Whereupon, and on motion of Mr. J I. R., Esq. of counsel for the respondent: It is ordered, adjudged and decreed, that the appeal of the said H. L. be, and the same is hereby dismissed. And it is further ordered, adjudged and decreed, that the said appellants do pay to the respondent his costs incurred by him in respect of the said appeal to be taxed. And it is further ordered, that the proceedings be remitted to the court of chancery, to the end, that the judgment of this court may be carried into effect, and that such further proceedings may be had in the said court as shall be agreeable to justice and equity.

No. 9. *Order by consent for time to file Petition and return Transcripts, and in default for Dismissal, nunc pro tunc.*

[Caption, &c. as in No. 1. De Lancey and others, v. Seymour, March 13, 1827.]. It is ordered, by the consent of both parties in this cause, that the appellants shall be allowed three weeks from this day to cause the petition of appeal in this cause to be filed with the Register or assistant Register, and procure a proper return, to this court, of the said petition, with the necessary papers thereto annexed, and that in default, in case the said court shall not be in session at the time of procuring such return, &c. the same is to be considered as filed as of this day; and in case the said appellants shall neglect to procure such return, &c. to be made within the time aforesaid, the respondents may take a rule as of this day dismissing the said appeal, unless the said appellants shall show to this court, or to the Chancellor, satisfactory reasons why the said petition shall not have been filed and a return procured as aforeaid, within the said time, in which case the said appellants

CHAP. II. shall have such further time for procuring such return &c. as the said court, or the Chancellor, deem reasonable.

No. 10. *Order after Appeal filed and proceeded upon for Dismissal pursuant to mutual agreement, between respondents and the husband of appellant, who was married after appeal.*

[Caption as in No. 1. Title. D. F. and S. A. W. appellants, vs. J. B. C. and others, respondents. Case of Fisher v. Clark, September 26, 1829.] On filing a certificate of the marriage of L. S. and D. F. and sundry affidavits, and also certain articles of agreement and settlement, by which it appears that the said S. A. W. and L. S. have settled and compromised the above cause with the respondents, and agreed that the appeal in the same be dismissed; and on motion of Mr. F. of counsel for the said parties, ordered that the appeal brought in this court in the above cause be dismissed without costs, and that the record and proceedings be remitted, &c.

No. 11. *Order of Dismissal of part of the Appeal.*

[Caption same as in No. 1. Nichols vs. Warner, October 3, 1829.] On filing a petition in the above cause on the part of the respondent, praying that the petition of appeal filed in this cause be dismissed in part, and after hearing Mr. H. W. W. of counsel for the respondent, and Mr. P. R. of counsel for the appellant, ordered that the petition of appeal of the appellant in this cause, in so far forth as the same relates to the order of the court of chancery, dated on the eighteenth day of April, 1828, be dismissed.

No. 12. *Order of Dismissal without Costs to either.*

[Caption, &c. as in No. 1. Williamson vs. Heyer, September 30, 1829, and Chapman vs. Hamersley, same date.] On filing affidavits and notice of a motion on the part of the respondent to dismiss the petition of appeal filed in this cause, and on filing affidavits on the part of the appellant, and after hearing Mr. P. M. R. of counsel for the respondent, and Mr. B. of counsel for

the appellant, ordered that the petition of appeal in this cause be, and the same is hereby dismissed without costs to either party as against the other, and that the record and proceedings be remitted, &c.

No. 13. *Order to postpone Motion on Petition for Dismissal.*

[Caption and title as in No. 1.] On filing affidavits, notice, and a petition of the respondents praying for a dismissal of the appellants petition of appeal, and after hearing Mr. V. V. *ex parte*, for the respondents, ordered, that the decision of the motion be postponed until Tuesday next.

No. 14. *Order to Dismiss with Costs, but without prejudice, for want of Prosecution.*

[Caption, &c. as in No. 1. Case of Walker v. Meads, January 23, 1826.] On filing a petition and an affidavit thereto annexed, and on filing a notice, and the admission of the service thereof, and on hearing Mr. H. of counsel for the appellants, and Mr. V. R. of counsel for the respondents, it is ordered, adjudged and decreed, that the appeal brought into this court, in this cause, be dismissed without prejudice for want of prosecution; that the appellant pay to the respondents their costs in this court for defending the said appeal to be taxed. It is further ordered, adjudged and decreed, that the record and proceedings be remitted to the court of chancery, that such proceedings may be had in said cause as shall be thought just and equitable.

No. 15. *Order quashing Appeal for irregularity, but without prejudice to another Appeal.*

[Caption, &c. as in No. 1.] On filing affidavits in this cause, and on motion to dismiss the petition of appeal filed therein, and on hearing Mr. C. B. on the part of the respondent, and Mr. J. J. R. on the part of the appellant, ordered that the petition of appeal filed in this cause, and all subsequent proceedings thereon, be quashed and set aside for irregularity, but without pre-

CHAP. II.

judice to the right of the appellant to file a new petition of appeal with the proper officer of the court of chancery.

A party appellant submits to such parts of a decree as he does not appeal from; [*ante* § 62.] if another appeal should be presented by him, the party served with it ought not to answer, but to present a counter petition to have it dismissed. If he treats it as an effective appeal by answering, and suffering it to proceed before he presents a counter petition, he will not be entitled to costs.(*a*)

No. 16. *Order to prosecute Appeal as a poor person.*

[Whalen v. Whalen, January 8, 1824.] On filing a petition and affidavit in this cause, and on motion of Mr. Cunningham, of counsel for the appellant, ordered, that the respondents show cause, on Monday next, why the appellant may not prosecute his appeal in this cause in *forma pauperis*.

[Same v. Same, January 13, 1824.] No cause being shown to the contrary, on motion of Mr. C. of counsel for the appellant, ordered, that the appellant have leave to prosecute his appeal in this cause in *forma pauperis*.

No. 1. *General Form of the Answer.*

§ 77. Vol. 1. p, VI. Answer&preparations for argument. Cases &c. No. 1. Common form of answer to petitions of appeal. No. 2. Special form responsive to the allegations or statements in the petition. No. 3. Ditto where there has been intermediate appeals. No. 4. Notice

In the court for the correction of errors.

The answer of J. G. C., L. L., and J. S., assignees of the C. I. Company, respondents, to the petition of appeal of J. B. M. and J. B. M. appellants. [Case of Murray and Coster, 20 J. 576.]

The respondents not confessing or acknowledging all or any of the matters or things to be true as in and by the said petition of appeal are contained and set forth for answer thereunto say, that they believe it to be true that such decretal order or decree as is complained of by the appellants, was made by the court of chancery as in the said petition of appeal is set forth, but as to the date, substance, and contents thereof, these respondents humbly crave leave to refer thereto, when the same shall be produced; And the said respondents are advised and believe that the said decretal order or decree is agreeable to equity and justice, and they therefore pray that the

(*a*) 3 Bligh's (P.) Rep. 261.

same may be affirmed, and that the said petition of appeal may be dismissed this court with costs to be adjudged to these respondents.

D C. Solicitor and of counsel for respondents.
G. G. of counsel for repondents.(a)

No. 2. *Special Form responsive to the Petition.*

In the court for the (trial of impeachments and the) correction of errors.

The answer of R. L. respondent, to the petition of appeal of J. D. jun. appellant. [Case of Dyett v. Lenox: see the petition, p. 354.].

This respondent not confessing or acknowledging all, or any of the matters or things to be true, as in and by the said petition of appeal are contained and set forth for answer thereunto, says, that he believes it to be true that the appellant did, at or about the time specified in that behalf in the said petition, exhibit in the court of chancery of the state of New-York, his bill of complaint against this respondent to be relieved touching certain matters therein stated, which bill was afterwards amended by sundry additions thereto made, and that to the said bill of complaint this respondent filed his answer in the said court, and that the cause was thereupon put at issue by a replication, and that on the fifth day of June, in the year one thousand eight hundred and twenty four, and not on the fifth day of January in that year as is erroneously stated in that respect in the said petition, the said appellant previous to the hearing of the said cause did present to the said court of chancery a petition, setting forth certain matters therein contained, and praying that this respondent might be required to deposit certain letters, and copies of letters, therein specified or referred to, with the assistant Register of the said court, to the end that the same might be inspected by the appellant or his counsel, and that the prayer of the said petition having been opposed by, or on behalf of this respondent, was by an order of the said court threupon and on the same fifth day of June made, denied with costs to be paid by the said appellant, and which order this respondent respectfully

(a) Signature of one counsel is sufficient. 2 Paige, 185, 188.

of argument for clerk and opposite solicitor, and admission of service.
No. 5. Order that cause be entered on the calendar.
No. 6. Stipulation fixing the day for argument.
Cases & Points
No. 7. Case for appellants
No. 8. Case for respondents.
No. 9. Another, setting forth the pleadings *in hæc verba*.
No. 10. Another, setting out the material parts of the pleadings &c
No. 11. Joint case on appeal from Ch. denying motion to dissolve injunction.
No. 12. Another joint case on an appeal to the court of errors from decree of Chancellor on appeal from the order of Surrogate on the decision of a circuit judge

CHAP. II.

after an appeal to him. *Points, &c.* Modes of rectifying errors in the minutes returned. *Decree of dismissal* and *affirmance* for not bringing on the cause to argument. No. 13. Form of such decree. Consents: Reference of the cause by consent, to the decision of a counsellor at law.

insists, and is advised, was not erroneous, but just and equitable; nor was the appellant thereby compelled to go to a hearing in the said cause under material or any disadvantage, and this respondent respectfully submits and insists, that the said order being interlocutory, and not a final decree, and not appealed from within fifteen days after the making thereof cannot be called in question in this court, and that the same is not brought in question by the tenor and effect of the said petition of appeal, and this respondent further answering says, that he is informed and believes, that the said cause having been afterwards brought to a hearing before the Chancellor in the May term of the said court of chancery, in the year one thousand eight hundred and twenty-five, such decree as is complained of and appealed from by the said appellant, was made by the said court of chancery as in the said petition of appeal is set forth, but as to the date, substance, and contents thereof, this respondent craves leave to refer thereto when the same shall be produced; and this respondent is advised and believes that the said decree is agreeable to equity and justice, and he therefore respectfully prays that the same may be affirmed, and that the said petition of appeal may be dismissed this court with costs to be adjudged to this respondent.

G. W. S. Solicitor for the respondent.
G. G. of counsel for respondent

No. 3. *Another form where there had been intermediate Appeals.*

[In the court for, &c. (as before.) The answer of D. M. respondent, who is impleaded with S B. administratrix of J. B. deceased, E. P. junior, and T. L. assignees of A. C. and J. C. M., J. S., &c. to the petition of appeal of E. S., appellant. (See this case, Sebring v. Mersereau, 9 Cowen 344. 1 Hopk. 501.) This respondent not confessing, &c. (as before) for answer thereto, says, that he believes it to be true, and so far he admits that the appellant did, at or about the time in the said petition stated exhibit her bill of complaint in the court of chancery, before the Vice-Chancellor of the —— circuit of the state of New-York, against the several persons for that purpose named in

the said petition of appeal for the partition of certain lands in the said bill described; and that such proceedings were thereupon paid, and such decrees therein pronounced, and such appeals made as in the said petition are stated; but for greater certainty in this behalf, the said respondent begs leave to refer to the said proceedings, decrees and appeals. And he is advised and believes, that the said decree of the court of chancery, so far as it is appealed from, is agreeable to equity and justice, and he therefore prays that the same may be affirmed, and that the said petition of appeal may be dismissed this court, with costs to be adjudged to this respondent.

No. 4. *Notice of Argument for Clerk and for Solicitor, and his admission of Service.*

[Title. In the court for, &c. R. L. respondent, ads. J. D., junior, appellant, *or* J. D., junior, appellant, vs. R L., respondent.]

Sir,—You will please to take notice that I shall bring on the argument of the appeal in the above cause, at the next session of this court, to be holden in the Capitol in the city of Albany, on the —— Monday of —— instant, at the opening of the court in the forenoon of that day, or as soon thereafter as counsel can be heard. Dated, &c.

[Signed by the Solicitor for appellant or respondent, either of whom, or both, may notice the cause; and addressed to the opposite Solicitor fourteen days before the session, and a copy addressed to the clerk four days previously.]

Admission of Service.

Due service of the above is admitted this —— day of ——, 1830. ——, Solicitor for, &c.

[See admission or affidavit of service, p. 54-58.]

No 5. *Order that Cause be entered on the Calender.*

[Caption and title as in p 859.] On filing the transcript from the court of chancery and a petition of appeal by J. S. of counsel for the appellants, and on filing an answer to the petition of appeal by G. W. S. of counsel for the respondents, ordered, that this cause be entered on the calender.

No. 6. *Stipulation fixing the day for Argument.*

[Title.] It is hereby stipulated, that the argument of this cause shall not be brought on by either party, until the *Thursday* in the second week of the session of the court, without the consent of the other. Dated, &c.

(Signed by the Solicitors.)

Cases and Points.

A state of the case of each party is required; [v. 1. p. 51.] but the parties frequently unite in one [*post*]. The case is strictly an abbreviation only of the proceedings, and the points are considered, in taxation, a part of it.(*a*) But they may be printed separately, and delivered to the adverse party and to the members of the court on the opening of the argument. It is sometimes deemed expedient to do so, in regard to joint as well separate cases. The following outlines will show the mode of framing them. As a general direction, the case exhibits all the proceedings, bearing upon the subject of appeal in the order in which they arise, and each party of course presents his case in the strongest possible point of view, consistently with the facts disclosed in the pleadings and proofs.

No. 7. *Case for Appellants.*

[Title: In the court for, &c. Between ——, appellant, *or* ——, and ——, respondent. Case on the part of the, &c. *and* to which is also added the points, &c. *or* case agreed upon by the parties, &c. The title forms the title page of the printed case. The title of the following case of J. I. C., &c. ads. T. B. Coddington and Bay, 20 Johns. 637. *ante* p. 350.] The complainant, in his original bill filed in the court of chancery, on, &c. against, &c. alleges, that in the month of, &c. preceding, being the owner of a certain schooner, called the Express, he employed, &c. The bill then alleges, &c. An injunction pursuant to the prayer of the bill was granted by the order of the Chancellor, dated, &c.

(*a*) 2 Paige 185. 188-189. The draft of the original matter, inserted in the case, and two copies (for counsel to sign, and for the printer,) including matter not original, are allowed in taxation. ib.

To this bill R. and S. put in a joint and several answer on, &c. in which they admit the material parts of the respondent's bill, and set forth the correspondence between him and them relative to the sale, &c. That they received the notes from the purchasers on, &c. and gave in their own names the guaranty required by the purchasers, &c. and that, &c. The answer then alleges that, &c. Upon the coming in of this answer, the respondent on, &c. filed an amended bill against the appellants and R. and S. and therein after reciting his former bill, and the answer of R. and S. thereto, he charged that the appellants received the said notes from R. and S knowing that they had been given in p yment for the said schooner, &c. but admitted that, &c. and prayed that the appellants might be decreed to deliver up and account to the respondent for the said notes. To the amended bill R. and S. put in their joint and several answer, on, &c. and on the same day, the appellants also put in their joint and several answer to the said amended bill. R. and S. in their answer to the amended bill, state, that, &c. and the said R. and S. in their answer to the amended bill reiterate the averment contained in their answer to the original bill, that, &c.

The answer of appellants relative to the nature and amount of their responsibilities for R. and S. on, &c. is the same as that of R. and S. to the amended bill. On the subject of notice, the appellants, in their answer, do most unqualifiedly and unhesitatingly deny, that at the time of receiving the said notes, they knew, &c. or that they had any knowledge, information or intimation whatever, at the time they received, &c. and that they never heard, nor had any information, that, &c. The appellants further state, that, &c.

To the answers, the respondent filed replications in the court below, but neither party took any testimony or proofs in the cause, and the same was brought to a hearing upon the bills and answers at the October term, in the year, &c. of the court of chancery, and on, &c. the Chancellor made a decretal order in the cause, declaring that, &c. directing a reference to, &c. and

(a) The case is signed by two counsel, and the fee for each is taxable. 2 Paige 188.

CHAP. II.

directing all the defendants to the amended bill, to pay the amount of the sum so reported, &c.

From this decree the appellants have appealed to this court.

The bill, both original and amended, and the answers thereto, together with the decree, and the reasons therefor assigned by the Chancellor, will be found in the appendix to this case.

G. W. S., Solicitor for appellants.
G. G.
F. De P., jun. } of counsel for respondents.(a)

Points on the behalf of Appellants.

[Title.]

First: That the plea having been overruled, the defendants were at liberty to insist on the same matter by way of answer, and the proceedings on the new defence must be the same as if it had been originally made.

Second: That, &c. [see p. 353. and the next case.]

Case & Points for respondents, reciting a former appeal; on exceptions to report on exceptions to answer.

No. 8. *Case for Respondents.*

[Title. Between J. G. C. &c. respondents, and J. B. M. &c. Coster & Murray, 20. J. 576. see p. 353.] The respondents, J. G. C. &c. on, &c. filed their bill of complaint in the court of chancery of this state, against the appellants J. B. M. &c.; and therein stated, amongst other things, that, &c. The bill of the respondents after stating that the appellants refused to account or pay as required in the premises, and after calling on the appellants to answer particularly to all the matters and charges contained in the said bill, prayed that the appellants should render a just, full, and particular account, &c. Schedule A. of sales, &c. interest on the above, &c. To the said bill, the said J. B. M. &c. (the now appellants) put in the following plea and answer: 'These defendants, &c'

The cause was set down for hearing, and brought to argument at the —— term, in the year, &c. of the said court of chancery, on the pleadings aforesaid; and the Chancellor on, &c. thereafter made a decretal order, thereby ordering and decreeing, 'that the said plea and

(a) The case is signed by two counsel, and the fee for each is taxable. 2 Paige 188.

answer, accompanying the same, be over-ruled, and that the defendants put in a full and perfect answer to the bill, within four weeks after service of a copy of the said decretal order on their Solicitor, and that the question of costs, arising upon the said plea and answer, be reserved.

From the said decree, the defendants J. B. M. &c. entered an appeal to this court, which was set down for hearing, and brought on to argument at the September session thereof, in the year, &c.; and upon the argument of the said appeal, the counsel for the respondents took the following points, upon which he insisted that the Chancellor's decree ought to be affirmed:

First.—That this was an action concerning the trade of merchandize, &c. and excepted from the statute, &c.

Second.—That the appellants are trustees, and their claim relates to the execution of a trust, and therefore not within the statute.

Third.—That the answer accompanying the plea, denies, &c.

Fourth.—That the answer virtually acknowleges, &c.

Fifth.—That the answer did not fully and particularly deny, &c.

After the cause had been thus argued, this court, in the November session thereof, in the same year, 1822, made a decree therein, adjudging, ordering, and decreeing, amongst other things, that the decree of the court of chancery in this cause be affirmed, and that, &c.

A remittitur having been accordingly issued, remanding this cause to the court of chancery, an order was therefore entered in the —— term of the said court, in the same year, for the execution of said decree, thereby ordering and directing, amongst other things, that the said defendants, J. B. M. &c. put in a full and perfect answer to the said bill of complaint, within three weeks after service of a copy of said order.

The defendants thereupon, within the period limited by the said order, put in the following answer to the said bill of complaint, viz: 'These defendants, &c.'

CHAP. II.

To the said answer, the complainants took the following exceptions, viz.:

First.—For that the said defendants have not, &c.

Second.—For that, &c.

The defendants not having submitted to put in a further answer within the time limited for that purpose, an order was thereupon entered referring it to one of the Masters of the said court, 'to look into,' &c (reference of answer for impertinence and insufficiency) and the said master to whom it was so referred having been, in pursuance thereof, attended by the counsel of the respective parties, thereupon made the following report, viz.:

I, the subscriber, one of the Masters of this court, do report, &c. that I have looked into, &c. (the bill, answer, and exceptions,) and have heard the parties, &c. and having duly considered the same, I am of opinion, that each and all of the first six of the said exceptions, is, and are well taken, and that the said answer is insufficient in the points therein excepted to: and I am further of the opinion, that the remaining, or seventh exception, is also well taken, and that these words, 'not only' on the third line of the third page of the said answer, but also so much of the said answer as is contained between the words, &c. on the fourth line of the third page, and the words, &c. on the sixth and seventh lines of the same third page, being these words, 'but to the clear understanding,' &c. are irrelevant and impertinent, and ought accordingly to be expunged and stricken out of the said answer, as is irrevalent and impertinent.'

To the said report of the said Master the following exceptions were taken by the defendants in the court below, (the now appellants) viz:

First exception:—For that, &c.

Second exception:—For that, &c.

Third exception:—For that, &c.

The cause was set down for hearing on the aforesaid exceptions to the Master's report, and brought to argument at the —— term (1823), of the said court of chancery, and on, &c. the Chancellor made a decretal order, whereby it was ordered, &c. [over-ruling exceptions.]

To the last-mentioned decree, the said defendants, J. B. M. &c. have entered an appeal to this court.

D. C. Solicitor for respondents.

G G. / E. W. jr. } Counsel for respondents.

In the court for the correction, &c.

J. G. C. &c respondents, ads. / J. B. M. &c. appellants } Points on the part of the respondent.

The respondents respectfully insist that the decree or order of the Chancellor, made in this cause, and now appealed from, ought to be *affirmed*, for the following, among other reasons:

First.—Because when the defendants undertake to answer, they are bound to answer *fully*, &c.

Secondly.—Because the answer, in fact, (by the defendants below, now appellants) contains, in substance, nothing more than the identical defence heretofore presented by them to the court below, and afterwards to this court, on the former appeal, and that therefore the matters contained in the said answer have already been adjudicated upon and over-ruled by this court, as forming no defence in the cause.

Thirdly.—Because the parts of the said answer referred to in the seventh exception are, in fact, wholly irrelevant and impertinent.

G. G. counsel for the respondents.

No. 9. *Another, setting forth the pleadings in hæc verba.*

[In, &c. (court of Errors.) Between the Orphan Asylum Society, in the city, &c. respondents, and Peter McCartee, one of the executors of the last will of, &c. appellant. *Case on the part of the respondents.* See 9 Cowen 437.]

This is an appeal on the part of P. McC. one of the executors of, &c. P. J. deceased, and one of the defendants in the court of chancery, from a decree of that court, made and entered on, &c.

CHAP. II

The bill was filed on, &c. against, &c. and is in the words and figures following, to wit, 'To the Chancellor, &c. Humbly complaining, &c. (*the bill* down to 'May it please, &c.')

To which said bill, the defendants filed several answers, as follows:

The separate answer of P. McC., one of the defendants to the bill of complaint of, &c. This defendant now, &c. (*answer and schedules* referred to and annexed.) The separate answer of R. C. one of the defendants, to, &c. This defendant now, &c. (answer and schedule referred to.)

The joint and several answer of P. T. and E. his wife, to the bill, &c. (joint and several answer.)

To the answer of the defendant P. McC. a general replication was filed by the complainants, on or about the, &c. at which time, a petition for the appointment of a receiver, and notice of a motion to be made thereon, were served on the defendant, P. McC., which petition was in the words following, to wit:

To, &c. The petition of the complainants, &c. Respectfully showeth, &c. That, &c. And your petitioners will ever pray.

J. A. J., Solicitor for complainants.

On presenting the above petition to the Chancellor, and on making the motion thereon, at the —— term of said court, pursuant to the aforesaid notice, the cause was fully argued by the respective counsel for the parties, upon the merits; and while the same was held under advisement by the Chancellor, rules for producing witnesses and passing publication (or closing proofs) were duly entered, and the cause regularly set down (or noticed) for final hearing, upon the pleadings, (no proofs having been taken by any of the parties) at the next ensuing term of the court of chancery, held in the city of, &c. and on the, &c. a decree was pronounced therein by the Chancellor, which is as follows: This cause having been fully argued at the last term of this court, by &c. on a petition filed by the complainants, for the appointment of a receiver; and the Chancellor having holden the same under advisement, until this present term, and the said cause being now regularly set down

for final hearing on the pleadings, and the counsel for the respective parties having severally declined to offer any further argument thereon: It is declared, &c. It is accordingly ordered, adjudged and decreed, and the Chancellor, in virtue of the power and authority of this court, doth order, adjudge and decree, that the defendants, &c. do forthwith execute and deliver to the complainants all such deeds and instruments of conveyance, to be approved of by one of the Masters of this court, as may be proper for vesting the complainants, and their successors, with all and singular the residuary real estate whereof the said P. J. died seized, and subject to the legal rights of the said P. J. and E. his wife. And it is further ordered, &c. (that defendants deliver up title deeds, &c.) And it is further, &c. that the defendant, P. McC. within thirty days after service of a copy of this decree, pay into the office of the assistant Register of this court, the sum of, &c. admitted by the said defendant in his answer to be in his hands, arising from the rents, &c. of, &c. and at the same time (assigning over to the assistant Register all securities for money in his hands.) And it is further, &c. referred to one of the Masters, &c. to take and state her account of such parts of the personal, &c. of, &c. as have come into the hands of the defendants, &c. or either, to be administered; and also, all monies that have come to the hands of the said, &c. or either, &c. arising from the sale, &c. and of all rents, &c. And it is further ordered, that the said Master, in taking and stating the said account of monies received by the said defendants, or either of them, belonging to the estate of, &c. charge interest on the several sums so received, from the respective times when the same were received except for such time as the same may have remained in his or their hands unproductive, without negligence or default on his or their part. And it is further ordered, that the said Master take an account of all the securities for monies in hands of defendants, &c. belonging to, &c. and that the said Master, in stating, &c. credit the same respectively with whatsoever monies, and securities for moneys, may be paid or delivered into the office of the assistant Register of this court, in pursuance of this decree. And it is

CHAP. II.

further ordered, that the said assistant Register of this court appoint some discreet person to receive the rents and profits of the real estate of the said P. J. deceased, who shall pay the same, from time to time, as the same are received by him, into the office of the Assistant Register; and that the person so appointed be allowed for his services such compensation as is usual in such cases. And all further questions are reserved until the coming in of the Master's report.

From this decree, an appeal to the court for the trial, &c. and the correction, &c. was filed in the names of two of the defendants, to wit: P. McC. and R. C. soon after the making of the said decree, and a petition of appeal, in their names, was filed in this court, on or about the, &c. to which an answer was filed by the respondents, and the cause duly put at issue. On the (16th Sept. 1826,) a motion was made to this court, and an order entered in said cause, in the words and figures following; to wit: 'On motion of Mr. D., of counsel for the appellants, with the consent of Mr. B., of counsel for the respondents, it is ordered, that the name of R. C. one of the above appellants, be struck out from the petition of appeal filed in this cause, and that the appeal be further prosecuted in the name of P McC. only, and in the same manner as if originally filed in his name and behalf only.'

In pursuance of the terms of which order, the said appeal is now prosecuting, in the name and on the behalf of the said P. McC. as sole appellant, who contends, that the decree of the Chancellor ought to be reversed. And the respondents, on the other hand, insist that the said decree ought to be affirmed.

I. A. J., Solicitor for respondents.
D. B. O. }
S. B. } Counsel for respondents.

No. 10. *Another, setting out the material Parts of the Pleadings, &c.*

[Spader, c. ads. Hadden, &c. See 20 Johns. 554.] The bill of complaint in this cause was filed in the court of chancery, on, &c. by the respondents W. S., B. H., &c. merchants and co-partners, carrying on trade and business in the city of New-York, under the name of W. S.; and N. H. and E. H., merchants, &c. carrying on,

&c. in, &c. under the firm of N. and E. H., &c. for themselves and all others, the creditors of J. D. merchant, lately carrying on trade in the said city, who should be allowed so to do, and should come in and contribute, &c.; and states that the said J. D., being largely indebted to the respondents and others to the amount of, &c. did on, &c. stop payment without being urged so to do by the respondents by any proceedings, &c. and did then refuse, &c. and still refuses, &c.

That the said J. D. at the time, &c. owned and possessed, &c.

That the said J. D. at the time, &c. came to a secret and fraudulent determination, and entered into a secret and fraudulent combination with the appellant, &c.

That, &c.

The bill then states, &c.

The bill further states, &c.

The bill then, after the general charge of confederacy, states, &c.

The bill thereupon prays that, &c.

The bill then concludes with a prayer for relief, and subpœna.

Both the defendants entered their appearance on, &c.

The answer of the appellant admits, &c.

The appellant admits, &c.

The appellant says that, &c.

The appellant admits that, &c.

The answer of the appellant concludes with the general denial of combination and confederacy, &c.

The answer of the defendant J. D. admits that, &c.

He admits that, &c.

This defendant also admits that, &c.

The answer concludes with the usual denial of combination and confederacy, &c.

B. H. Solicitor for Respondents.

G. G. } of Counsel for Respondents.
J. S. C. }

Respondent's Points.

1. The bill being filed by the repondents, as execution creditors, for themselves and all the other creditors of D. will be sustained; especially, as it does not appear that there are any other judgment or execution creditors.

CHAP. II.

2. The respondents, at the time of the filing of their bill, had acquired, as execution creditors at law, a priority of right, valid in equity, to the trust monies belonging to the defendant, Davis, in the hands of the appellant; and all payments of the same by the appellant, subsequent to the filing of the bill, were made in his own wrong.

Joint case on appeal from order of Chancellor denying a motion to dissolve injunction.

No. 11. *Joint Case.*

[Case and Harwood, appellants, v. Haight and Arthur, respondents: Joint case made by counsel of the respective parties. Albany, 1829. See this cause 3 Wend. 632.

The respondents, on or about the (2d December, 1826) filed their bill in the court of chancery, stating as follows:

1. That prior to, &c. in the year, &c. S. D. of, &c. died seized of, &c. And that the said S. D., by his last will and testament executed as the respondents believe in due form of law, devised the said land in fee to his children, S. D., P. D., &c.

2. That on the said, &c. P. S. then of, &c. by deed, &c.

3. That by virtue of sundry mesne conveyances, &c.

4. That the said J. A. &c. (so on to the end of the charging part of the bill.)

The bill concludes with a prayer that the said J. C. and A. H. might answer the premises; and that they and their servants and confederates might be restrained, &c.

The bill was sworn to in the usual form, and in pursuance of the prayer thereof, the appellants were restrained from proceeding in the construction of their dam.

The appellants filed their joint and separate answer, on, &c. admitting, denying and stating as follows:

1. That they have been informed and believe, and therefore admit, that, &c.

2. That the appellants have been informed, and are therefore willing to admit, &c.

3. They admit, &c.

4. That they have no knowledge, information, or grounds, for forming a belief, that, &c.

5. That the appellants have heard, and believe, and therefore admit, &c.

6. That they have no knowledge, information, or grounds, upon which to found a belief as to the allegations contained in the said bill: That, &c.

7. That they deny, &c.

8. That they admit, &c.

9. That they deny, &c.

10 That, &c.

The joint and separate answer concludes with a general denial of all combination and confederacy, and praying that they may be dismissed with their reasonable costs, to be paid by the respondents.

This cause was brought before the court of chancery, on a motion to dissolve the injunction on bill and answer, on, &c.; and on, &c. the Chancellor delivered the following opinion: (opinion of Chancellor.)

That in pursuance of the aforesaid opinion, the following order was entered with the Register of the court of chancery, on, &c. (At a court of, &c. present, Reuben H. Walworth, Chancellor; J. C. &c. v. J. A. A. &c. Here follows the certified copy of order *denying* the motion to dissolve the injunction.)

It is from the forgoing interlocutory order, that the present appeal is made; and the appellants will contend that the said order is erroneous, and ought to be reversed for the following reasons:

1. The appellants have a clear title derived from P. S. &c.

2. That the reservations and concessions contained in the conveyance from P. S. to S. D., &c. in favor of, &c. P. D, &c. relative to butting a dam, &c. entitle the appellants, &c.

3. That the respondents are estopped, &c.

A. V. V., J. K. of counsel for appellants.

The following are copies of the deed between P. S. of the one part, and S. D., P. D. &c. (deed.)

It will be contended, on the part of the respondents, that the order appealed from should be affirmed, and the appeal be dismissed with costs, for the following, among other reasons:

CHAP. II.

1. In the deed between P. S. and the devisees of S. D. of the 5th July, &c. a right to butt a dam under the saving or reservation in said deed is void, &c.

2. The dam began by the appellants, if frustrated, would, especially in drought, divert the whole of the water, &c.

The motion to dissolve the injunction was, *therefore*, properly denied.

3. But if it can be inferred from the aforesaid deed, that, &c. the refusal of the motion was right, because, &c.

J. V. H.

B. F. B. of counsel for respondents.

No. 12. *Joint Case on Appeal from Chancellor on Decision of Surrogate after Appeal to Circuit Judge.*

Case on appeal from surrogate to Chancellor and thence to court of errors (or from surrogate to circuit judge and thence after return to surrogate to the Chancellor, and thence to the court of errors.) Outline of the case of the Leake will, in the cause, between Watts and Le Roy executors, &c. and The Public Adm'r. &c.

Title of cause, forming the title page of the case. 'In the court for the trial, &c. and the correction, &c. Between J. W. and H. Le R. executors of the paper writing propounded, &c. as the last will and testament of J. G. L. deceased appellants. and the Public administrator in the city of New York, respondent: Case by both parties.' See this appeal, 4 Wend. 168. 1 *Paige* 347. After the title follows the exemplification, by the Assistant Register, of the transcript of the surrogate's proceedings, returned into his office viz.: 'The people, &c. to all, &c. know ye that we having inspected' &c. [See form p. 33.] 'do find a certain transcript therein remaining, which is in the words and figures following: [here follows the surrogate's transcript and return] 'The people, &c. know ye that the annexed, &c. [see the form p. 336. The transcript contains the will, depositions and proceedings in the surrogate's court, his decree and opinion if any, and the appeal filed with him, and also in certain cases, see p. 338. would embrace the appeal, and proceedings before the circuit judge, his decision as certified to the surrogate, the final decree of the surrogate on such decision, a copy of his opinion if any, and the appeal to the Chancellor.] 'All which we have caused by these presents to be exemplified, and the seal of our said court of Chancery, &c. Witness R. H. W. Chancellor, signed by the Assistant Register. Then follows the proceedings in Chancery on the appeal, also certified by the Assistant Register, and which in the above case, were an order, and accompanying affidavits,

denying a motion to dismiss the appeal, and assigning another day to bring on the argument, (the notice of motion having been in the alternative, to dismiss or bring on the argument then;) copy of Chancellor's opinion, also certified by the Register; the decree of reversal of the surrogate's decree, also certified; the appeal therefrom [which is now simply a notice filed and served;] the petition of appeal to the court of errors and the proceedings in that court, viz. order on filing the petition and proceedings that respondent answer, and notice thereof as served with a copy of petition of appeal. The points in the above case, of which the following are the leading points for the appellants, were printed separately.

(Title.) *Points on the Part of the Appellant.*

The appellants will contend, that the decree of the Chancellor, reversing the sentence and decree of the surrogate of the city and county of New York, ought to be reversed, and that sentence and decree be affirmed for the following, among other persons:

I. By the express terms of the constitution, the testamentary law of England and of the colony of New-York, as it existed in that colony on the 19th of April, 1775, whatever it may have been, must govern; the power of altering or amending it having been delegated to the legislature only, and that power not having been exercised, so as to affect the present question.

II. To ascertain such law, resort must be had,

1. To the records of testamentary cases adjudged in this colony, prior to the revolution; and,

2. To the elementary books, and adjudged cases, published in England before the adoption of the first constitution.

The cases decided in England since the revolution, are not only no evidence of the law of '75, but they have materially departed therefrom, and have introduced principles and rules unknown at that day.

III. By the law of '75, the paper writing propounded by the appellants, being wholly in the handwriting of the deceased, and having been written and found, under the peculiar circumstances stated in the proofs, was a good will of personal estate, and the decree of the sur-

CHAP. II.

rogate was therefore correct, and ought to have been affirmed.

IV. Even if the latter cases decided in England, are to be considered, either as authoritative or as evidence of the law of '75, the decision of the surrogate establishing the paper as a good will of *personal* estate, was correct; because,

1. The paper was not intended as a draft, or memorandum, nor as instructions for a will; nor was it in any sense *deliberative:* on the contrary, it is evident, &c.

2. The paper is not only finished and complete in substance and intention, but also in form, with the single exception of the formalities, required by the statute of frauds, to make it valid as a will of lands.(*a*) As the testator was a lawyer, &c. &c. [The rest o the points went to the *intention* of the testator, to repel the presumption applied to unexecuted wills in modern English cases, and distinguishing the *facts in* those cases from the present.] (Dated) New-York, 1829. (Signed) J. V. H., P. A. J., B. F. B. Counsel for appellants.

Mode of rectifying errors in minutes below.

It has been held in England, that after the appeal is lodged, and cases printed with an appendix of evidence as entered in the Register's notes of the proofs read on the hearing, it is not competent for the Chancellor to make an order expunging a part of the evidence as entered by mistake. The course would be to apply here by petition for leave to proceed in the court below to rectify the mistake, and then the alteration would be made by the Chancellor under the direction of this court. An order for correcting the minutes thus made, was on appeal reversed.(*b*)

Decree of affirmance for not bringing on the cause to argument.

By a rule of court recently adopted,(*c*) it is ordered that, hereafter, this court will not hear an *ex parte* argument in favor of the affirmance of a decree. But if the cause has been regularly noticed for argument and placed on the calender of causes by the respondent, and the appellant does not appear to argue on his part, or does not furnish the printed cases as

(*a*) Now by statute no such will would be valid as to personals.

(*b*) 1 Bligh's New Rep. 255.

(*c*) Rule, Oct. 27, 1829. See 4 Wend. 168.

required by the rules of this court, the decree shall be affirmed with costs, together with such damages as the respondent would have been entitled to if the decree had been affirmed on argument, and that so much of the fifteenth rule of this court as is inconsistent with this rule be rescinded. The importance of an attention to this rule, and of a strict watchfulness of the calender is exemplified by the fact, that if the decree be affirmed under that rule, and *the proceedings remitted*, the court of Errors cannot reinstate the cause, even though the counsel was prevented by sickness from attending to argue, at the time the cause was set down.(*a*) The following form is adapted to the above rule.

No. 13. *Decree of Affirmance for not bringing Cause to Argument.*

[Chamberlin, &c. Appellants, vs. Fitch, Respondent, October 6, 1823.] This cause having been twice passed on the calendar or list of causes set down for argument, and no counsel appearing (*b*) on the part of the appellants to argue the said cause, on motion of Mr. Stevens, of counsel for the respondent, it is ordered, adjudged and decreed, that (*c*) the decree of the Chancellor be affirmed, and that the appeal be dismissed. It is further ordered, &c. that the appellant pay to the respondent his costs in defending this appeal to be taxed, and that the record be remitted to the court of chancery, to the end that this decree may be carried into execution.

Consents. Reference of an appeal cause by co sent to the decision of a counsellor at law.

The obligatory force of consents fairly entered into, is, it seems as fully recognized in this court as in chancery, and consequently orders and decrees by consent, would be binding on the parties. There is one instance on record in this court, of a decree made by a counsellor

(*a*) 4 Wend. 188.

(*b*) *Or* (as in case of Murray v. Mumford, Sept. 25. 1823.) 'the counsel for the appellant declining to argue the same.'

(*c*) 'The petition of appeal in this cause [Chamberlin vs. Fitch,] be dismissed, with costs to be taxed, and that the respondent have leave to take up his deposit in this cause, and that the record be remitted, &c. In the case of Murray, &c. it was ordered, &c. 'that the appellant pay to the respondents one hundred dollars in addition to the costs to be taxed for defending this appeal, and that the record be remitted &c.

CHAP. II.

at law, pursuant to an agreement of the Solicitors, referring the cause to his decision, and agreeing that such decision should be as conclusive as the judgment of the court for the correction of errors could be, and should be entered as the judgment of that court and filed with the clerk of the same as such. Accordingly his decision was signed by him and entered at large in the minutes of the court.(a)

§ 76. Vol 1. p. 73. Further proceedings in the court of errors to decree.

No. 1. Order that cause be remanded. to bring in parties on death of appellant.

No. 2. Order denying motion for rehearing.

No. 3. Decree dismissing cross appeal and that decree be entered *nunc pro tunc.*

No. 4. Decree of reversal.

No. 5. Ditto reversing order directing a feigned issue.

No. 6. Decree of affirmance.

No. 7. Ditto and that decree be *entered nunc pro tunc.*

No. 8. Affirm-

No. 1. *Order that Cause be remanded to bring in parties on death of Appellant.*

[Caption, &c. p. 359.] Evertson, impleaded with others, appellants, v. De La Vargue, Oct. 28, 1829. On filing a petition on the part of the above-named respondent in the above cause, and on affidavit annexed thereto. On motion of Mr. S. A. F. of counsel for the respondent; Ordered, that the above cause be remanded to the court of chancery, to the end that the proper steps may be taken in that court to call in the parties whose interests have accrued by the death of G. B. E. the above-named appellant, pending the said appeal.

No. 2. *Order denying Motion for re-hearing.*

[Caption and title, p. 359] The appellant files petition for a re-hearing in this cause. Ordered, that the petition be dismissed on the ground that the same motion has been heretofore decided.

No. 3. *Decree dismissing Cross-appeal, and that it be entered nunc pro tunc.*

[Caption, &c. p. 359 Blachford and others vs. Murray. Dec. 27, 1828.] This cause having been heard upon the cross appeal of R. M B. and others, this court, after hearing of counsel of the respective parties, and after due deliberation thereon had, doth order, adjudge, and decree, and it is hereby ordered, adjudged, and decreed, that the said cross appeal of R. M. B. and others, be dismissed. And it appearing to this court that the above-named respondent has deceased since the

(a) Case of Cooper. &c. v. Robbins, &c. April 5, 1824; referred to and decided by the late John V. Henry, Esq.

hearing of this cross-appeal, it is further ordered, adjudged, and decreed, that this decree be entered with reference to the time of hearing, on the twenty-eighth day of June last, so as to take effect from that day, and that this cause be remitted to the court of chancery to the end that this decree may be carried into effect.

ance in part, and reversal in part. Clause in decree allowing bill of review in court below. No 2. Order to stay remittitur on suggestion of an intended appeal to the supreme court of the United States.

No. 4. *Decree of reversal.*

[Caption, &c. p. 359.] Baker v. Stackpole, Dec. 26, 1827. Counsel having been heard in this cause, and due deliberation being thereupon had: It is ordered, adjudged, and decreed, that the decree of the Chancellor appealed from in this cause, be reversed. It is further ordered, adjudged, and decreed, that the record and proceedings be remitted to the court of chancery to the end that the decree of this court may be carried into execution.

No. 5. *Reversal of Order, directing a feigned Issue.*

[Caption, &c. p. 359.] Title: Reed v. Vanderheyden, Jan. 12, 1826.] This cause having been heard, and due deliberation being thereupon had, it is ordered, adjudged, and decreed, that the order or decree of the court of chancery of the twenty-ninth day of April, one thousand eight hundred and twenty-five, directing a feigned issue to be made up and tried between the above-named parties be, and the same is hereby reversed and vacated; and it is further ordered, adjudged, and decreed, that the said court of chancery do dismiss and quash the appeal brought by the said J. V. V. in the said court of chancery, from the order or decree of the Surrogate of the county of R. and all proceedings had thereon, without costs below to either party: And it is further ordered, adjudged, and decreed, that the record and proceedings be remitted to the court of chancery that this decree be there executed.

No. 6. *Decree of Affirmance.*

[Thomas Gibbon, appellant, v. Aaron Ogden, respondent, Jan 18, 1822 See *post* No. 9. and § 79; see the case 17 J. 488. 4 J. Ch. 150. 175.] This cause having

CHAP. II

been heard and fully considered; It is ordered, adjudged, and decreed, that the final decree of the court of chancery, in this cause appealed from, be in all things affirmed with costs to be taxed, to be paid by the appellant to the respondent, and that the record be remitted, &c.

No. 7. *Affirmance, and that Decree be entered nunc pro tunc.*

[Caption p. 359. Sebring v. Mersereau and others: Dec. 25, 1827. 9 Cowen, 344.] Counsel having been heard in this cause, and due deliberation being thereupon had; It is ordered, adjudged, and decreed, that the decree of the Chancellor in this cause appealed from, be in all things *affirmed*; and that the appellant pay to the respondent his costs in this court, to be taxed, and it being suggested by the respondent's counsel that the appellant has deceased since the hearing of the appeal; It is ordered, adjudged, and decreed, that this decree be entered with reference to the time of the hearing on the thirteenth day of July last, so as to take effect from that day; And it is further ordered, adjudged, and decreed, that the record be remitted to the court of chancery, to the end that the decree of this court may be carried into execution.

No. 8. *Affirmance in part, and reversal in part.*

[Caption, &c. p. 359. Malin v. Malin; Dec. 26, 1828.] Counsel having been heard in this cause, and due deliberation being thereupon had: It is ordered, adjudged, and decreed, that the decrees appealed from be affirmed, except so far as they relate to lots No. 45, 46, and 47, and the lands conveyed to the Botsfords by the deed of August 26, 1799. It is further ordered, adjudged, and decreed, that B. B. and E. B were bona fide purchasers without notice of the trust in favor of J. W. of the 400 acres conveyed to them by E. M. on the twenty-sixth day of August, 1799, and that so much of the decree below as directs a release to be given by said Botsfords to the complainant of the said four hundred acres be, and the same is, hereby reversed. It is furtber ordered, adjudged, and decreed, that there is not sufficient evidence of a trust in favor of J. W. in relation to lot No. forty-five and forty-six. But that S. R. took an

estate in fee in said lots without any trust under the will of A. R., and that the complainant, R. M. is entitled to an estate for life therein, under the will of the said S. R., and that she holds the same under the trust declared and appointed by the will of J. W. It is further ordered, adjudged, and decreed, that there is no evidence of any trust in relation to lot number forty-seven, and that so far as the decrees below relate to said lot, they ought to be reversed: It is further ordered, that this cause be remitted to the court of chancery, to the end that this decree may be carried into execution.

Clause in decree allowing a bill of review to be filed in the court below.

It seems the court of chancery cannot entertain a bill in the nature of a bill of review upon the ground of newly discovered facts, to review a decree which had been affirmed in the court of errors, unless such right has been expressly reserved by the final decree of the appellate court. If the facts are sufficient to authorize a review, a provision to that effect might be inserted in the decree of affirmance.(*a*)

Consolidation of separate appeals.

Where separate appeals on distinct orders are heard and decided together, the court may direct both to be consolidated in the order of affirmance to save the expense of two remittiturs and of separate orders, enrolments and executions in the court below.(*b*)

Order to stay remittitur.

If it be intended to appeal to the Supreme Court of the United States, [§ 79.] an order may be obtained on suggestion, to stay the remittitur, as follows:

No. 9. *Order to Stay Remittitur.*

[Caption, p 359, Gibbons v. Ogden, January 18, 1822. See the decree in that cause, *ante* No. 6, and the appeal to Supreme Court of United States, *post* § 79.]

It being suggested by the counsel for the appellant, that a writ of error will be prosecuted by him out of the Supreme Court of the United States in this cause, it is ordered, that the record and proceedings therein be retained in this court, and that unless the respondent shall make up the record of the decree of this court within twenty days, the appellant be at liberty to do so, and that certified copies of the pleadings, proceedings and decree in the court of chancery, be attached to the

(*a*) 2 Paige 45. 47. (*b*) 2 Paige 186. 190.

CHAP. II.

record in this court, and be certified in return to such writ of error if the same be brought, under the seal of this court, and the signatures of the president and clerk of this court.(a)

§ 79. Vol. 1. p 74. Remittitur, &c. Appeal to Supreme Court of the U. States. First, Remittitur costs and proceedings in the court below. No. 1. Bill of costs. No. 2. Form of Remittitur. No. 3. Order or decree in chapcery on presenting and filing remittitur, pursuant to decree of *affirmance*. No. 4. Another form. No. 5. Another form, *on reversal*. No. 6. Order on reversal for Register to pay back the deposit. As to further proceedings in the court below, see *post* § 80-83. Costs, enrol-

After remittitur, the jurisdiction of the court of errors ceases, unless the order on which the remittitur issues is irregularly obtained or erroneously entered, or any *irregularity* occur in remitting the proceedings to the *court* below; in which cases the proceedings are considered as remaining in the court of errors, and the remittitur may be superseded. But where the decree was duly affirmed by the default of the counsel of the appellants in appearing to argue at the time the cause was set down for argument, although absent from sickness, but no irregularity intervened, the court decided they had no further cognizance, and could not make any order respecting it.(b) When there are separate appeals on distinct orders, the Solicitor is entitled to fees on both till the proceedings are consolidated. Therefore, no allowance is made for duplicate proceedings after *argument* where the court decided both appeals together, and directed them to be consolidated in *the order* of affirmance, to save the useless expense of two remittiturs and of separate orders, enrolments and executions in the court of chancery to carry into effect their decision. The party should obtain *one* remittitur reciting both appeals, and containing the decision of the court thereon, as consolidated and entered in the minutes of the clerk. But the filing the remittitur in the court of chancery, and the order consequent thereon, and the enrolment of the decree of the court of appeals, and the execution for the costs awarded by that court, are a necessary part of the costs of the appeal, and must be incorporated into the same bill, and annexed to the enrolment of the decree in chancery.(c) The costs are taxed in the court of chancery and inserted in the judgment of this court sent down [v. 1. p. 74.] as follows:

(a) A like order had been entered in a prior appeal between the same parties, March 27, 1820, in which it was also ordered, 'And that certified copies of the pleadings and proceedings in the court of chancery, including the deed from D. D. T. and others, to the appellant, read on the hearing in that court, be attached.' &c. A similar order also was granted January 31, 1825, in Read v. Fleet, on Error from Supreme Court.

(b) 4 Wend 188.

(c) 2 Paige 196. 196.

No. 1. *Bill of Costs on Affirmance.*

Retaining fee for Solicitor $3, and for counsel $3 75. Solicitor attending clerk on entering respondents appearance, 50. Notice of respondents appearance entered, 37 1 2. Draft written request for clerk to enter common order(*a*) that appellant file petition of appeal, fol. 1 at 28. Engrossing to file, 14 [Dr. Order, fol.—. This and other common orders the clerk is usually allowed to draw as well as enter.] Solicitor attending clerk entering order, 50. Notice of ditto, with certified copy of order to appellant's Solicitor, 37 1-2. [Serving certified copy of order. Qu.? This is omitted in the late fee bill, and is, perhaps, not taxable; but all necessary notices are taxable.] Dr. aff't of service, fol. —, at, 28: engrossing at, 14. Oath, 12 1-2.

1830. Sept. Term. Common order to compel filing petition

[If any special motion become necessary then:] Dr. affidavit to ground motion for order to file copy of minutes, sed Qu.? fol. — at 28. Engrossing at 14. Oath 12 1-2. Copy to serve at, 7. Dr. affidavit of service, fol. — eng. and oath. Drawing brief for the motion, $1. Solicitor attending the motion, $ 1. Counsel attending pursuant to notice to make the motion, $1 25. [Motion not made or argued.] Counsel arguing motion, $2 50. Solicitor attending the motion argued or opposed, $1 50. Dr. order, fol. — at, 28. Attending clerk on entering same, 50. Notice with copy of order, 37 1-2. Serving certified copy of the order, 25. Qu? Dr. affidavit of service, fol. — eng. and oath. [If a petition become necessary, as for leave to have an error in minutes returned rectified in the court below, then:] Dr. petition, fol. — eng. — and oath, 12 1-2(*b*). Copy for use of counsel —. Do. to serve —. [Attending counsel for his perusal and signature, 75, ?] Counsel perusing and amending the petition, $1 50. Notice of motion thereon and service, 37 1-2. Dr. affidavit service, &c. [as in case of special motion, as above. Drawing case for counsel, preparatory to answer and attending counsel therewith for advice, are omitted in the new fee bill, but

Sept. 12. Special motion in relation to the minutes.

Sept. 15. Petition to rectify minutes.

Sept. 19. Petition filed. minutes se-

(*a*) Not taxable as a special motion, Fulton v. Beach, on appeal 2 Paige 185.

(*b*) The jurat is considered part of the petition. See Stafford v. Bryan, 2 Paige 45.

CHAP. II.

turned, and error therein rectified.

drawing and engrossing every necessary paper, proceeding, or pleading, is taxable as in chancery by the folio] Dr. answer to petition of appeal, fol. — at, 28. Engrossing to file at, 14. Copies for use, for signature, one counsel,(c) and for opposite solicitor, at 7. [attending one counsel for his perusal and signature to answer, 75, Qu ?] Counsel perusing, amending, and signing answer, $2 50. Notice to opposite Solicitor of answer filed, 37 1-2. Dr. case (containing original matter) for the court of errors, fol. — at 25; copy of same, including copy of the matter appended or not original, at 10 for counsel; another copy for printer, at 10.(d) Attending two(e) counsel for their signatures, *each* 75. [Abbreviating the case, is not taxable. The points are also deemed a part of the case.(f) Counsel perusing, amending, and signing the case. This was formerly taxed at $2 50 for each of two counsel; but the allowance does not appear in the late fee bill. 2 R S. 623-4, that fee is given for perusing, &c. a petition of appeal or answer, and the case includes both. The fee for perusing, &c. every special pleading, is $1 50.] Superintending the press and correcting the proof sheets, $5. Expenses of printing actually paid — [The fees allowed under former statute 2, R. L. 13., of 50 cents for serving copy of case on the Chancellor, and 25 cents on the president of the senate, each senator, and justices of supreme court, thirty-six in all, are omitted in the late fee bill.]

Case.

Cause set down for hearing at — term.

Drawing brief for counsel on hearing, $2. [nothing for copy.(g) Notice of argument for appellant's Solicitor, 37 1-2. Do. for clerk, 37 1-2. [Solicitor and counsel attending on motion to set down cause, $2 25. Qu. ?] Solicitor attending Clerk, on entering order to set down cause or enter it on calender, 50. Counsel attending to argue the cause pursuant to notice, $3 75 to one only. Counsel attending to oppose motion to put off cause, $1 25. Arguing the motion, $2 50. Solicitor attending, $1 50. Notice of argument for appellant's Solicitor and for clerk, 75, [if cause be argued, then :] Counsel arguing cause, $3 75. Solicitor attending upon the argument, $5. [If not argued, but respondent

Cause continued.

(c) Not two to an answer, 2 Paige, 188.
(d) 2 Paige, 188.
(e) 2. R. S. 624. 2 Paige, 188.
(f) 2 Paige, 185.
(g) ib.

obtains affirmance on default of appellant in appearing or declining to argue, then:] Counsel attending to argue, $3 75. Solicitor attending motion for affirmance, $1; and counsel moving, $1 25. [Do. Solicitor and counsel on motion to dismiss appeal, $2 25. Do. for costs, $2 25. Do. for remittitur, $2 25. These have been taxed; but it was recently held that the allowance of separate Solicitors and counsel fee for every distinct point or direction in an order or decree, is illegal (*g*)] Dr. order [but this the clerk usually draws] fol. — at 28. [Attending counsel with draft order to settle, $1 25. Qu.?] Counsel perusing, amending, and settling, $1 50. Solicitor attending clerk with draft to enter, 50. [Drawing the remittitur, fol. — at, 28. Copy to keep —. Copy for clerk —. This is usually allowed to be done by the clerk.] Obtaining the remittitur and attending court of Chancery therewith; $1. Dr. *fi. fa.* on affirmance, fol. —. Engrossing, — and seal, 12 1-2. Postage paid —. Dr. affidavit of disbursements, fol. —. Copy and oath, —. Dr. affidavit (*if made*) of performance of services, except those charged prospectively, fol. —. Copy, —. Oath, 12 1-2. Draft bill of costs, fol. — at, 28. Copy of bill with notice of taxation, $1. Attendance on taxation, $1. Officer's fees for taxation, $1 50.]

[*Costs in Chancery on filing Remittitur.*]

Solicitor and counsel on motion for order to carry into effect decree of court of errors, &c. $2 50. Solicitor attending, $1. [Brief for counsel, $1 Qu.? as the motion, though special, requires no previous notice.] Dr. special order on presenting and filing remittitur, fol. — at, 28. Counsel perusing and settling same, $2 50. Solicitor attending Assistant Register with draft order to enter, 50. [Qu.? Are these costs if not taxed prospectively and included in the judgment of the court of errors, to be included in the general bill of costs in the cause, or, especially if the order affirmed be interlocutory, to be treated as interlocutory costs and en

(*g*) 2 Paige 185.

CHAP. II

forced as other interlocutory costs are, by precept, for commitment on non-payment? *ante* p. 60, &c. and *post* § 82, &c. In such case add: copy to serve of the order on filing the remittitur, and which gives the costs of this motion, affidavit of service, copy of costs, notice taxation, taxation, attendance, affidavit of demand, &c. order for, and dr precept for commitment, engrossing and seal, &c See *post* § 82.

[Add to the foregoing bills, the bills of fees of clerk of court of errors, crier's fee, Assistant's Register's fees, &c.]

No. 2. *Form of Remittitur.*

State of New-York:

A. B. Pleas in the court for the Correction of Errors, held at the Capitol in the city of Albany, (*or City-Hall of the city of New-York*, as the case may be) on the —— (*day and year when the decree was pronounced in this court*) before the President of the Senate, the Senators and Justices of the Supreme Court of Judicature of this State.

J. F. BACON, Clerk.

——, Appellant, v. ——, Respondent. } Be it remembered, that on the —— (*day and year when the petition of appeal was returned and filed with the Clerk of this court,*) the appellant in this suit, came here into the court for the Correction of Errors, by ——, Esquire, his Solicitor, and ——, Esquire, his counsel, and filed his petition of appeal from an order of the court of chancery of this state, in the words following, to wit: (*Here take in appeal.*) To which said petition of appeal, the said respondent in this cause, on the —— (*day and year of filing the answer,*) in the year aforesaid, came here into the said court, by ——, Esquire, his Solicitor, and ——, Esquire, his counsel, and filed his answer, in the words following, to wit: (*Here take in answer.*) Whereupon

this cause having been argued by the counsel for both parties, and due deliberation being thereupon had, the said court for the Correction of Errors, did order, adjudge and decree: (*Here take in decree.*) Therefore it is considered by the said court for the Correction of Errors, that the decree aforesaid of the Chancellor be —— (affirmed, reversed, or as the decree may be,) with —— dollars, &c. (as in case of affirmance,) to be paid by the appellants to the respondents for their costs in defending this appeal; [*or* that the said decree of the said court of chancery be affirmed; and that the appellant pay to the respondent the further sum of $—, for the interest due on the sum so decreed by the said court of chancery, to be paid by the said appellant, and also the costs of the said respondent in defending said appeal, which costs amount to the further sum of $—, as taxed in the said court of chancery;] and that the record and proceedings be remitted to the court of chancery, to the end that the judgment of this court may be carried into execution. And hereupon the record and proceedings aforesaid, as also the judgment of the said court, are remitted to the court of chancery to be proceeded upon according to law.

No. 3. *Order or Decree on presenting and filing Remittitur, pursuant to a Decree of Affirmance.*

[Caption and title. In Chancery, &c. as in § 32. p. 78. Case of Coster and Murray, June 18, 1825, see p. 372.] The record proceedings and judgment of the court for the Trial of Impeachments and the Correction of Errors, wherein the said J. B. M. and Jas. B. M, were appellants, and the said J. G. C., L. L. and J. S. assignees as aforesaid, respondents, having been remitted to this court to be proceeded on according to law, whereupon, upon reading and filing the remittitur whereby it appears that the decree of this court made in the said cause, on the third day of May, 1823, and appealed from by the defendants, to the said court for the Trial of Impeachments and the Correction of Errors, was by the said last mentioned court affirmed, [and that the said ——, do pay to the said ——, —— dollars and —— cents, being the costs of the said ——, in the said last

CHAP. II.

mentioned court in that behalf taxed ;(a)] and by the said last mentioned court, it was further ordered, adjudged and decreed, that the record and proceedings be remitted to the court of chancery, to the end that all necessary orders and proceedings be had and made in the said court of chancery, to carry into effect the order and judgment of the said court for the Trial of Impeachments and the Correction of Errors, and the said decree of the court of chancery thereby affirmed, and on motion of Mr. G. G., of counsel for the said complainants, it is ordered, adjudged and decreed by this court, that the said judgment of the said court for the Trial of Impeachments and the Correction of Errors, and the said decree of this court thereby affirmed, be carried into full operation and effect, and that the said complainants in this cause have execution against the said defendants for the costs directed to be paid in and by the said judgment of the said court for the Trial of Impeachments and the Correction of Errors and the said decree of this court thereby affirmed, together with the costs of this motion.

No. 4. *Another form.*

[Caption, &c. p. 78. Case of Mersereau & Sebring, March 8, 1828, see p. 368.] On reading and filing the remittitur in this cause from the court for the Trial of Impeachments and Correction of Errors, whereby it appears that the said court have ordered, adjudged and decreed, that the decree of the Chancellor in this cause appealed from, be in all things affirmed, and that the said complainant do pay to the said defendant D. M. $144 45, being the costs of the said D. M. in that court, in that behalf taxed. Whereupon, and on motion of George Griffin, Esquire, of counsel for the said D. M. It is now ordered, adjudged and decreed by the Chancellor, that the said decree of the said court for the, &c. be carried into execution according to the true intent and meaning thereof, &c.

(a) In the original form in this case of Coster and Murray, the words for which those in brackets are substituted, were 'with costs to the complainants in this cause to be taxed upon the said appeal to the said last mentioned court.' But by a recent rule [see v. 1. p. 74.] the costs, though taxed in the court of [illegible]ery, are inserted in the [illegible]t of the court of Errors [illegible]d.

No. 5. *Another, on Reversal.*

[Caption, &c. p. 78. Roberts & Boyd v. Anderson, &c. 18 J. 515, on reversal of, 3 J. Ch. 371.] The record, proceedings and judgment of the court for the Trial of Impeachments and the Correction of Errors, in the cause in which the said defendants were appellants, and the said complainants were respondents, having been remitted to this court to be proceeded upon according to law, whereby it appears that the decree and orders of this court in the above cause complained of, are ordered, adjudged and decreed to be reversed; on motion of Mr. B., of counsel for the defendants, and pursuant to the said decree of reversal, it is ordered, adjudged and decreed, and the chancellor doth hereby order, adjudge and decree, that the complainants' bill in this cause be, and the same is hereby dismissed, and that the injunction thereupon obtained be dissolved, and that the said respondents pay to the said appellants their costs in this suit to be taxed.

No. 6. *Order on Reversal, for Register to pay back Deposit.*

[Caption, &c. p. 78. Slee v. Bloom. At an adjourned court of Chancery, November, 1822.] The decree in the above cause being reversed, Ordered, that the deposit, [$250,] paid to the Register, on taking the appeal in the above cause, be refunded to the complainant, or his Solicitor, after deducting such fees as shall be due to the said Register, on taking said appeal according to the rules of the court. J. K.

APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

It is declared by the constitution,(c) that the judicial power of the United States *shall be vested* in one Supreme Court, and such inferior courts as congress may from time to time establish; and *shall extend* to *all*

(c) Const. U. S. art. 3. §. 1. 2. 11. 3d cong. 2 sess. Dec. 2. 1793. adopted 1787. Amendments, art. 6 Wheat. 264.

CHAP. II.

cases, classified in the constitution; and that, in certain cases therein enumerated, the supreme court *shall* have original jurisdiction, and in certain others, appellate, with such exceptions and under such regulations as congress shall make. The language was mandatory. Congress could not refuse to create a supreme court, and vest in it the whole constitutional jurisdiction, nor refuse to create some inferior courts in which to vest all that jurisdiction which under the constitution is *exclusively* vested in the United States, of which the supreme court cannot take *original* cognizance:(*d*) accordingly, by the *judiciary act*,(*e*) passed two years after the adoption of the constitution, the supreme court was organized, and district and circuit courts established.(*f*) The *jurisdiction* of the supreme court is pointed out by the constitution, but the distribution of the powers of the inferior courts is regulated and governed by the acts by which they are constituted.(*g*) The *original* jurisdiction of the supreme court, but which is not necessarily an *exclusive* jurisdiction, unless *possibly* 'in cases affecting ambassadors, other public ministers and consuls'(*h*) is fixed by the constitution; but the appellate jurisdiction is made dependent upon, and could not have been exercised until regulated by act of congress.(*i*) The appellate jurisdiction extends to all cases to which the judicial power of the United States extends other than those which are within its *original* jurisdiction, 'with such exceptions, and under such regulations, as the congress shall make;' and had this court been merely created by law, without describing its jurisdiction, the constitution would have been the only standard by which its powers could be tested But as the jurisdiction of the court has been affirmatively described by the judiciary act.(*a*) it has been regulated by congress; this regulation must be understood as prohibiting the exercise of other powers than those described,(*b*) and from the rule thus provided by congress the

(*d*) Martin v. Hunter's Lessee, 1 Wheat. 304. 323. 352.
(*e*) Act of 1789. ch 20. 1 L. U. S. 53. Judge Story's ed.
(*f*) As to the present second circuit, which includes N Y. See act of 1802. ch. 31. 2 L. U. S. (Story's ed.) 855.
(*g*) 1 Paine 453.
(*h*) 11 Wh. 467.
(*i*) 3 Dall. 321. 327. 7 Wh. 38. 41.
(*a*) 1789. c. 20. § 13. 22.
(*b*) Wilson v. Mason. 1 Cranch 45 91. Durousseau v. The U. S. 6 Cranch 307. 312.

court cannot depart.(c) The appellate power might have been extended to all cases other than those where original jurisdiction was given, but having been thus regulated, there is an implied negative limiting the power to those cases where appeal is expressly given by congress.(d)

The exercise of the power thus regulated, so far as the state courts are concerned, is, 1st. By removal from the state courts into the circuit court, and thence by appeal to the supreme court of the United States. 2d. By appeal directly from the state courts, to the supreme court of the United States. Appeals to that court in suits commenced or decided in the court of chancery of this state may, therefore, after a removal of the cause from this court, be made from the final decree of the circuit court of the United States; and from the final decree of the court for the correction of errors, after an appeal from the court of chancery.

1st. *Appeal to the Supreme Court on final Decree of the Circuit after removal from Chancery.*

Circuit courts have original cognizance concurrent with state courts of civil suits in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and the United States are plaintiffs or petitioners; or an alien is a party; or the suit is between a citizen of the state where the suit is brought, and a citizen of another state.(e) Circuit courts have also original cognizance, at law or in equity, in all suits arising under any law of the United States, granting or confirming to authors or inventors, the exclusive right to their respective writings, inventions, and discoveries, and upon any bill in equity, filed by any party aggrieved in any such cases, may grant injunctions to prevent the violation of such rights.(f) If a suit in which the

(c) Wiscart v. Dauchy, 3 Dall. 321. 327.
(d) 3 Cr. 159. 1 Cr. 212. 7 Wh. 38.
(e) Judiciary act, 1789. ch. 20. § 11. U. S. v. Moor, 3 Cr. 159.
(f) Act of Cong. 1819. ch. 143. vol. 3. p. 1719 (Story, J. ed.) But *original*, it has appeared, is not *exclusive*. Whether state courts of equity might interpose by injunction to restrain the infringement of a patent and protect privileges secured by act of congress? see 2 Paige 134. 14 Ves. 130. 7 Ves. 1. Bla. 396. 398. 9 J. 307. 7 J. Ch. 611. 1 J. Dig. 278-9, 378, 380.

CHAP. II.

matter exceeds the sum of $500, as above-mentioned, be brought in a state court *against* an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, or between citizens of the same state, claiming title to land in question, under grants from different states,(*g*) the suit may in the former cases at the time of defendant's appearance, and in the last before trial, be removed into the circuit court of the United States in the manner pointed out in another part of this work (*h*) From all *final* decrees(*i*) (including, of course, those in suits removed,) where the matter in dispute, exclusive of costs, exceeds the sum or value of $2,000,(*j*) rendered in any circuit or district court acting as a circuit court,(*k*) an appeal may be allowed to the supreme court of the United States. Upon such appeal a transcript of the bill, answer, depositions, and *all* proceedings in the cause are transmitted to the supreme court; no new evidence is admissible, and the appeals are subject to the same rules, regulations and restrictions prescribed in law in case of writs of error.(*l*) The cause is then removed, not by *writ*, but by *appeal* only: but the removal must be under the same rules, regulations, and restrictions, as writs of error under the judicatory act(*m*) as to the time within which it is

(*g*) See Town of Pawlet v. Clark, 9 Cr. 292. But see 4 Dall. 3.

(*h*) *Ante* vol. 1. p. 252 *post* ch. 8 § 9 Judiciary act 1789. c. 20 § 12. vol. 1. p. 57. Story ed.

(*i*) The intention of the legislature in giving the court jurisdiction on *final* decrees only, is, that causes should not come up in fragments or successive appeals, which would occasion very great delays and oppressive expenses. 3 Peters 307. see 4 Dall. 22. 3 Dall. 401. The refusal of the court below to allow a plea to be amended or new plea to be filed, or to grant a new trial, or to continue a cause, cannot be assigned as a cause of reversal on writ of error, 6 Cran. 206. see 2 Wh. 306. 7 Cr. 152. Costs and expenses are not matters positively limited by law, but are allowed in the exercise of a sound discretion of the court. No appeal (from the circuit to the supreme court) lies from a mere decree respecting costs and expenses, 3 Peters 319.

(*j*) See the construction of this clause of the act, as to the amount in controversy, 3 Peters 34, 35, 469. 1 Peters 248. 1 Branch. 276. 5 Cr. 13. 287. 4 Cr. 216. 316. 4 Dall. 20. 3 Dall. 401.

(*k*) The district court for the northern district of New-York has circuit jurisdiction [illegible] appeals, and writs of error, L. of U. S. 1814. ch. 108. § 3. vol. 3. p. 410. Story's ed.

(*l*) L. of U. S. 1803. ch. 93. Story's ed. vol. 2. 905.

(*m*) Judicary act, 1789. c. 20. § 19. 22, 23, 24. Laws, U. S. vol. 1. p. 60, 61. 260, 273. on writ of

brought, the instances in which it is a supersedeas, the citation, the security, and the restrictions as to reversals, except that where the appeal is prayed at the same term in which the decree is pronounced, a citation becomes unnecessary.(e) An appeal prayed for and allowed within five years, is valid, though the security was not given until after the lapse of five years. The mode of taking the security, and the time for perfecting it, are within the discretion of the court below, and this court will not interfere with the exercise of that discretion.(f)

2. *Appeal from Final Decree of the Court of Errors upon an Appeal from Chancery.*

The 25th section of the judiciary act, authorising an appeal directly from state courts, is as follows:

The 25th section of the judiciary act, authorising appeals from state courts; and construction of said section. Writ of error. No. 1. Form of the writ. No. 2. Citation. No. 3. Bond. Return of original writ and citation, with transcript of the record and proceedings below. No. 4. Form of transcript. Docketing cause, filing record; and further pro-

"A *final* judgment or decree in any suit in the highest court of law or equity of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties, or laws, of the United States, and the decision is in favor of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party, under such clause of the said constitution, treaty, statute, or commission, may be re-examined and reversed or affirmed in the supreme court of the United States, upon a writ of error, &c. 'But no other error shall be assigned or regarded as a ground of reversal, in any such case as aforesaid, than such as appears on the face of the re-

error instead of appeal from district court (exercising circuit jurisdiction) of Louisiana, the court considered it as a *case* submitted. The record consisted of the petition, answer, the whole testimony and fiat of the judge, 3 Peters 424-5.

(e) The San Pedro. 2 *Wh.* 132.

(f) The Dos Hermanos, 10 *Wh* 137 306.

CHAP. II.

ceedings in supreme court. No. 5. Decree of reversal (in the steam boat cause) No. 6. Decree of affirmance. and proceedings thereon. No. 7 Mandate of supreme court and proceedings thereon in the court of errors. No. 8. Form of decree of the court of errors on filing the mandate. Remittitur to the court of chancery and proceedings thereon; the decree of that court in pursuance thereto, and further remittitur if the appeal cause did not originate there, but was brought up on appeal from a Vice Chancellor, Surrogate, &c.

cord, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities, in dispute.'(a)

The construction of this important section will be considered, first, in detail; secondly, generally. First: The decree must be 'final.' The word *final* must be understood in this section as applying to all judgments which determine the particular cause, and could not have been intended to be confined to those judgments and decrees only in which the right was finally decided, and could never again be litigated between the parties.(b) If the suit be remanded to an inferior court where it originated for further proceedings not inconsistent with the judgment of the highest court, it is not final: as a judgment of the highest court of law of a state, *deciding* in favor of the validity of the statute of a state drawn in question on the ground of its being repugnant to the constitution of the United States;(c) or, a judgment reversing that of an inferior court and awarding a *venire facias de novo*;(d) or, a decree of the highest court of equity of a state affirming the decree or *order of an inferior court of equity* of the same state *refusing* to dissolve an injunction.(e) *The decree may be* '*in any suit*,' The term *suit* is a very comprehensive one, and is understood to apply to any proceeding in a court of justice, in which an individual pursues that remedy in a court of justice which the law affords him. A writ of *prohibition* is a *suit* within the meaning of the section.(n) *The suit must be in the* '*highest court*;' but these words are qualified by the words 'in which a decision could be had.' Hence an appeal lies from an *inferior* court of a state where no appeal lies to a higher court of *the same* state.(o) The suit must draw in question, the *validity* of

(a) § 25 judiciary act 1789. ch. 20.

(b) Weston et al vs. The city council of Charleston, 2 Peters 449.

(c) Winn's heirs vs. Jackson et al. 12 Wh. 135.

(d) Houston v. Moore, 3 Wh. 433.

(e) Gibbons vs. Ogden, 6 Wh. 448. See further, Young v. Grundy, 6 Cr. 51. Rutherford v. Fisher 4 Dall. 22 see *ante* 400. A decree for sale of mortgaged premises, is final, Ray v. Law 3 Cr. 179. See vol. I. ch. 2. § 28.

(n) Weston, et al. vs. The City Counsel of Charleston, 2 Peters 449.

(o) See Cohens vs. Virginia, 6 Wh. 264. 375: see Olney vs. Arnold, 3 Dall. 308.

a *treaty*, *statute*, or *authority*, under the United States, and the decision must be *against* their *validity*; or the *construction* of such treaty, statute, or commission, or of the constitution. and the decision be against the *title*, &c. set up *under* it. If the validity of a treaty is drawn in question in the state court, and the decision is against its validity, the supreme court has jurisdiction, whether the treaty be drawn in question incidentally or directly. But the words of the act must be restrained by the constitution, by which it is declared that the judicial power of the United States shall extend to all *cases* arising *under* the constitution, laws and treaties. Whenever a right grows out of, or is protected by a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is to be protected. But if the party's title is not affected by the treaty, if he claims nothing *under* the treaty, his title cannot be protected by the treaty. Thus where the defendant in ejectment between two citizens of the same state for lands in the state, set up an outstanding title in a British subject as protected by the 9th article of the treaty of 1794, and the highest court of law or equity decide against such title, it is not a case for writ of error, for it is not, a *case* arising *under* the British treaty. If the British subject, or his heirs, or persons claiming under him, had claimed in the cause, then it would have been a case growing out of, or arising under the treaty, and must have been protected.(*r*) But if the validity or *construction* of a treaty is drawn in question, and the decision is *against* the validity, or *against* the *title* specially set up by either party *under* the treaty, the supreme court has jurisdiction to ascertain that title, and determine its legal validity, and is not confined to the mere abstract construction of the treaty itself.(*a*) So also, where the construction of any clause in the constitution, or of any statute of the United States is drawn in question. the decision must be *against*, not in *favor*(*b*) of the title, right, privilege,(*c*) or exemption(*d*) set up

(*r*) Owings vs Norwood's lessee, 5 Cr. 344. 347-8 Matthews vs. Zane, 7 Wh. 164. 206. n.

(*a*) Martin vs. Hunter's lessee, 1 Wh. 304. 337-8. Matthews vs Zane 7 Wh. 164. 206. p. 6 Cr 286.

(*b*) Gordon vs. Caldcleugh, 3 Cr. 268.

(*c*) ib.

(*d*) See Montgomery vs. Hernandez 12 Wh. 133.

CHAP. II.

by the party *under* such clause of the constitution or statute. It is not sufficient that the construction of the statute was drawn in question, and that the decision was against the title of the party. It must appear that his title depended upon the statute.(e) And the court, being confined to an examination of the title as depending upon the construction of the act, where a party claims title under it, cannot take into consideration any distinct equity arising out of the contracts or transactions of the parties, and creating a new and independent title.(f) Another branch of this section authorises a writ of error, where is drawn in question the validity of a *statute* of, or *authority* exercised under, any *state*, on the ground of its *repugnancy* to the constitution, treaties, and laws of the union, and the decision is *in favor* of such their validity. Under this clause arose the celebrated question as to the validity of the acts of the legislature of this state securing to certain citizens of the state, the exclusive navigation, by steam, of the Hudson river. The result of that great question is well known. The forms of proceeding in the case(g) will be presently given, to illustrate the course of practice under this section. Where the validity of a statute of any state is drawn in question, upon the ground of its being repugnant to the *constitution of the United States*, and the decision is in favor of its validity, it is necessary to the exercise of the appeliate jurisdiction that it should distinctly appear that the *title* or right of the party *depended on the statute*.(h) The court has appellate jurisdiction in a case where the question is, whether a confiscation of the property of British subjects, under a law of the state, was complete, before the treaty of peace between the United States and Great Britain of 1783, the 6th art. of which protects the titles of British subjects not actually confiscated.(i) But the court will not, on writ of error from a state court, declare a *state law* void on account of its collision

(e) Williams vs. Norris 12 Wh. 117. see Montgomery vs. Hermandez 12 Wh. 129.

(f) Matthews vs. Zane 7 Wh. 164. 206.

(g) Gibbons vs. Ogden, 9 Wh. 1. on appeal from and reversal of 17. J. 488. on appeal from and affirmance of 4 J. Ch. 150. 175. also Winn's heirs vs. Jackson et al 12 Wh. 135.

(h) Williams vs. Norris 12 Wh. 214.

(i) Smith v. Mayland, 6 Cr. 286. 304.

with a *state constitution*. This is not a case embraced in the judiciary act.(*a*)

The last clause, restraining the grounds of reversal to such as *appear on the face of the record*, and *immediately* respect the construction of the treaty or statute in dispute, applies only to cases where parties claim under various titles, and assert various defences, some of which may, and others may not regard the construction of a treaty or statute, and was intended to limit what would otherwise have attached to the court, the right of revising all the points in dispute, and to confine it to such errors as respect the questions specified in the section.(*b*) There must be something apparent on the record bringing the case within the jurisdiction of the supreme court. But it is not necessary that the record should in terms state a misconstruction of the act, &c.; or that it was drawn in question. It is sufficient that the record should show that an act of congress was applicable to the case.(*c*) It has never been required that the act or treaty under which the party claims who brings the final judgment of the state court into review before this court, should have been pleaded specially, or spread on the record. But it has always been deemed essential to the exercise of jurisdiction in such a case, that the record should show a complete title under the treaty or act of congress, and that the judgment of the court is in violation of the treaty or act (*d*) But it is sufficient if, from the facts stated, such a question as is within the purview of this section must have arisen, and the judgment of the state court would not have been what it is, if there had not been a misconstruction of the contitution, or some treaty of the United States, or act of congress, or a decision against the validity of the right, title, privilege, or exemption set up under it, or that the constitutionality of a state law was questioned, and the decision was in favour of the party claiming under such law.(*e*)

(*a*) 3 Peters 288-9.
(*b*) Matthews v. Zane, 7 Wh. 164, 206. n. 1 Wh. 357.
(*c*) Miller v. Nichols, 4 Wh. 311. 316. In which case, though an act giving the U. S. priority in cases of insolvencies had been disregarded yet the insolvency not appearing on record, the court had no jurisdiction. Inglea v. Coolidge, 2 Wh. 363.
(*d*) Hickie v. Starke, 1 Peters 98.
(*e*) 3 Peters 292. 301-2. 2 Peters 245. 380, 409. 12 Wh. 117.

CHAP. II.

Secondly: General view of the section.

The jurisdiction given by this section was exercised by the Supreme Court without question till 1815, when on reversal of a judgment of the court of appeals of Virginia,(a) and on issuing a mandate, that court declared the unconstitutionality of such an act of Congress, and refused obedience.(b) Their decision thereupon was deemed final, and another writ of error was brought. Though on error upon a decision refusing to obey the mandate, a mandamus might perhaps be the proper remedy, as the merits of the original judgment cannot be again inquired into, the former record not now being before the court.(c) Yet the Supreme Court, in this case upon re-asserting their jurisdiction re-examined from motives of a public nature, the question of jurisdiction as it stood upon the record formerly in judgment.(d) In 1821, the question was again raised and so also decided,(e) and the jurisdiction re-asserted whoever the parties might be, though one was a state and the other a citizen of the same,(f) and in all cases where the constitution, acts, and treaties are in question.(g) For these are the supreme law of the land, made obligatory, as such, as well by the *constitution* as by the oath of office of the judges of every *state*,(h) and the appellate jurisdiction in all cases arising under the constitution, laws, and treaties, is, by the constitution(i) expressly vested in the Supreme Court, with such exceptions, and under such regulations, as the Congress

(a) Martin v. Hunter's lessee, 1 Wh. 304. 351. 354. 362 recognised in U. States v. Lathrop, 17 Johns. 4. 5. 8. 15. 261.

(b) Sergeant's Constl. Law 407.

(c) See 12 Wh. 431. 7 Wh. 60.

(d) See Serg. Const. Law 407. 1 Wh. 354. 304. 7 Wh 58. 6 Wh. 352 n. 400. 1 Cranch 175. Judiciary act § 14. 13. as to mandamus, and 1 Wh. 362. 3 Dall. 42. 7 Cr. 577. 2 Dall. 409. 4 Hen. and Munford 173.

(e) In Cohens v. Virginia, 6 Wh. 264. See also Montgomery v. Hernandez, 12 Wh. 129.

(f) *Or* where two citizens of the same state claim title under the same act of *Congress*, Mathews v. Zane, 4 *Cr* 382. The appellate power is not excluded by the character of the parties. The amendment prohibits suits *by* citizens, &c. against states. But a writ of error brought *by* a citizen from the decision of the highest state court where the citizan was therein sued by the state, is not a suit against a state within the section.

(g) 6 Wh. 264. 387. 1 Wh. 377. 3 Cr. 159.

(h) *Const. U. S.* Art. 6. 1 Peters *C.C.R.* 390. 2 Peters 255. 1 Paine 56. 1 Wash. *C.C.R.* 322. 9 Wh. 210.

(i) *Const. U. States*, Art. 3. § 2. 1 Paine 463. 1 Peters 545.

shall make. Congress, accordingly, as remarked, in distributing among the courts respectively, the judicial power of the United States as constitutionally defined,(k) have, by their judiciary act,(a) among other exercise of powers to give effect to the constitution, given appellate jurisdiction from state courts, by writ of error *only* from decisions of their highest courts.(b) Since 1821, many cases (c) of such appeals have occurred, and the question of jurisdiction is at rest. This jurisdiction, in cases under the constitution, laws, and treaties of the Union, is not limited by the value of the matter in dispute. It extends to a case where both parties claim a right or title under the same act of Congress, and the decision is against the right or title claimed by either party.(d) Two states cannot, by any compact between themselves respecting titles to land acquired under grants from one of them, oust this court of its appellate jurisdiction given to it by the constitution and judiciary acts made in pursuance therewith.(e)

Writ of Error.

Writ of error within what time, in what form, how directed when the cause had been remitted, how remittitur staid, and when the writ is a supersedeas, and how served. Form, &c.

Writs of error are to be brought within five years after rendering or passing the judgment or decree complained of, exclusive of any time of disability arising from the person entitled to the writ being an infant, feme covert, non compos mentis, or imprisoned.(f) Where there is a joint judgment against several defendants, and one only sues out the writ, it is irregular. If the others refuse to join, perhaps the plaintiff may have summons and severance.(g) The writ could formerly issue, regularly, only from the clerks office of the Supreme Court.(h) But the clerk of that court was after-

(k) Const. U. States, Art. 3. § 1-2. See 1 Paine 453.
(a) Act 1789. ch. 20. § 1. 13. 22-25.
(b) Ib. § 25. 7 Cr. 504. See 1 Wh. 342.
(c) Weston v. The City Council of Charleston. 2 Peters 449. Montgomery v. Hernandez, 12 Wh. 129. 419. Williams v. Norris, 12 Wh. 117. Buel v. Van Ness, 8 Wh. 312. Gibbons v. Ogden, 9 Wh. 1. 6 Wh. 448. See 2 Peters 380. 245. 1 Peters 98. 7 Wh. 164. 206. 1 Cr. 22. 91. 3 Cr. 170. 159. 3 Dall. 237. 308. 6 Cr. 312. 307. 7 Cr. 504. 3 Wh. 246. 433. 6 Wh. 290. 376. 264. 352 n. 7 Wh. 58. 42. 2 Wh. 18.
(d) Buel v. Van Ness, 8 Wh. 312. 321.
(e) Wilson v. Mason, 1 Cr. 45. 91.
(f) Act 1789, ch. 20. § 22. 25.
(g) Williams v. Bank of United States, 11 Wh. 414.
(h) 2 Dall. 401.

CHAP. II.

wards required to transmit to the clerks of circuit courts the form of a writ of error approved by any two of the judges of the court; and the clerks of the circuits are authorised to issue writs agreeably to such forms, 'as nearly as the case may admit,' under the seal of the circuit courts, returnable to the Supreme Court, in the same manner as the clerk of the Supreme Court may issue such writs.(*d*) Accordingly, the form was designed by the judges of the Supreme Court, and transmitted by the clerk of that court to the clerks of the respective circuits, and though the form is peculiarly adapted to the circuit courts, yet it is settled that it is equally applicable (being of course adapted to the local tribunal,) to appeal from state courts. The writ itself need not state that the court is the highest state court. It is not necessary at this stage that such fact be shown. The writ is the act of the court, and if issued improvidently, the question is open on a motion to quash it. No one is precluded by the emanation of the writ, and the right of the party who demands it, ought not to be finally passed upon by a judge at his chambers. It is a writ of common right in the cases to which the jurisdiction of an appellate court extends, and the abuse of it is sufficiently guarded against. There can be no danger of its being hastily or erroneously used, since it must be allowed either by the presiding judge of the state, or a judge of the Supreme Court of the United States. The object of the writ is to cite the parties to the Supreme Court, and to bring up the record, upon an inspection of which the court will determine whether the judgment of the state court was *final*. Hence this fact also need not be stated in the writ.(*e*) The writ may be directed to any court in which the record and judgment on which it is to act, may be found; and if the record has been remitted by the highest court, &c. to another court of the state, it may be brought by the writ of error from that court.(*f*) But to obviate the necessity of this, a motion may be made in the highest court to stay the remittitur, upon a suggestion that a writ of error will be

(*d*) Act 1792, ch. 36. § 9. 1 Story's L. U. States. 260.
(*e*) Buel v. Van Ness, 8 Wh. 312.
316. 319-21.
(*f*) Gelston, et al. v. Hoyt et al. 3 Wh. 246. 303.

brought, [see form of an order on such a motion, p. 389.](b) But by the twenty-fifth section of the judiciary act, the writ issues '*under the same regulations*,' prescribed for the circuit in the twenty-third section. Accordingly the writ will be a supersedeas, and stay execution in cases only where the writ is served, by a copy thereof being lodged for the adverse party, in the clerk's office, where the record remains, within ten days, Sundays exclusive, after rendering the judgment or passing the decree complained of, until the expiration of which term of ten days, executions shall not issue in any case where a writ of error may be a superdeas.(c) The words '*under the same regulations*,' have not, however, any reference to the value of the matter in dispute. The questions intended to be provided for by the twenty-fifth section, by appeal from state courts, are not as those to which the twenty-second section relates, of mere *meum* and *tuum*, but are noticed only for their national importance, and deemed proper for an appellate tribunal, from the principles, not the sums, that they involve.(d)

No. 1. *Form of the Writ of Error.*

United States of America, ss.

The President (e) of the United States of America, to the President of the Senate of the State of New-York, the Senators, Chancellor, and Justices of the Supreme Court of said State, being
L. S. the Judges of the Court for the Trial of Impeachments and the Correction of Errors, holden in and for the said State of New-York, Greeting:

Form of writ of error. This was the form allowed in the steam-boat case, Gibbons v. Ogden, 9 *Wheat.* 1. on appeal and reversal of, 17 J. 488. on appeal and affirmance of. 4 J. Ch. 150, 175.

Because, in the record and proceedings, as also in the rendering of judgment, or passing the final decree (f) in a suit before you, or some of you, between T. G. appellant in the said court for the Trial of Impeach-

(b) See form of return of transcript in Gibbons v. Ogden, *post* 417, see 9 Cowen 526. 529 n.
(c) Act 1789. ch. 20. § 25. 23. As to effect of writ when not a supersedeas, see 7 *Cr.* 602. 278.
(d) Buel v. Van Ness, 8 *Wh.* 312. 323.
(e) All process in this court is in the name of the President. R. v. Supreme Court, Feb. Term, 1790.
(f) The writ need not expressly state that it is directed to a *final* judgment. 8 *Wh.* 312.

CHAP. II.

ments and the Correction of Errors, and A. O. respondent in the said court, in a plea upon the petition of appeal of the said appellant, appealing from a certain order or final decree of the court of chancery of the said state of New-York, in the said petition of appeal set forth or mentioned, wherein (*c*) the validity of an authority exercised under the laws of the United States was drawn in question, and the decision of the said court for the Trial of Impeachments and the Correction of Errors, was against the validity thereof, and wherein the validity of certain acts or statutes of, and authority exercised under, the said state of New-York, was drawn in question, on the ground of their being repugnant to the constitution and laws of the United States, and the decision of the said court for the Trial of Impeachments and the Correction of Errors, was in favor of the validity of the said acts or statutes and authority exercised under the said state, manifest error hath intervened, to the great damage of the said T. G. as he alleges: And forasmuch as the said court for the Trial of Impeachments and the Correction of Errors *is the highest court of law or equity of the said state* (*d*) of New-York in which a decision in the said suit could be had; and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that if judgment thereof be given or decree made, then under your seal you do distinctly and openly send the record, process, and proceedings, in the suit aforesaid, with all things concerning the same and this writ, so that you have the same before the Chief Justice and the associate Justices of the Supreme Court of the United States on the *first* Monday of *February* next, (*e*) at the city of Washington, being the present seat of

(*c*) It is incumbent on the plaintiff in error to show that this court has jurisdiction. United States v. The Brig Union. 4 Cr. 216. But see p. 408.

(*d*) It has been decided that this allegation is unnecessary. Buel v. Van Ness, 8 *Wh.* 312.

(*e*) The session of the supreme court is now held on the second Monday of January annually, instead of the first Monday of February. 13 Stat. L. U. S. p. 222, act 1832, ch. 87. The circuit court of the district of New-York is held at the City Hall of the city of New York, on the last Mondays in May and October.

the national government,(*f*) that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done. Witness(*g*) John Marshall, Esq, Chief Justice of the said supreme court at the city of Washington aforesaid this *fifth* day of *February*, in the year of our Lord one thousand eight hundred and *twenty-one*, and of the Independence of the United States the *forty-fifth*.

S. J. Attorney. —— Clerk, of the Circuit Court of the U. S. for the Southern District of N. Y. in the Second Circuit.

Allowed the 22d day of January.

(Signed,) B. LIVINGSTON.

Writ of error and service.

The service of the writ is the lodging a copy for the adverse party in the office of the Clerk of the Court, and where the judgment was rendered by the judiciary

Ib ch. 38.) There is but one annual session of the court which may be held by any four of the Justices thereof at the city of *Washington*. If four be not present within ten days, the business of the court continues over: but any one justice may make orders touching any writ of error or appeal, &c. returned to said court, preparatory to hearing The former (by judiciary act, 1789, ch. 20, § 1. 1 Story's edit. p 53,) additional session of the court, on the first Monday of *August* is abolished. But still on that day, the justice of the fourth circuit is required to attend, and is empowered to make orders touching any writ of error, appeal, &c preparatory to the hearing; and all writs and process may be made returnable to the court on the first Monday in August, in the same manner as to the regular session of the court; and may also bear teste on the said first Monday in August, as though a session of the court was holden on that day. It is the duty of the Clerk to attend the said justice on that day, and enter all matters ordered by him; and at every such August sessions all proceedings relative to any cause must be continued over to the ensuing session of January 2 Story's L. U. S. 853-4, act 1802, ch. 31, sec. act 1789, ch. 20 § 1. 1 Story's ed. 53.

(*f*) The words 'the present seat of the National Government, might have been rendered necessary under the judicary act which appointed two annual sessions in February and August to be held 'at the seat of government,'(Story's L. U. S. 53.) but the act above quoted, see note (*e*) expressly directs the annual session to be held at the city of *Washington*.

(*g*) All writs and processes issuing from the supreme or circuit courts bear test of the chief justice, or if the office be vacant of the associate justice next in precedence (act 1792, ch. 36. Story's ed. vol. 1. p. 257. act 1789 ch 20. § 1. 1 Story, 53.) writs may be tested as of the first Monday in August as well as of the regular annual term of January. (see n. *e*) The writ must bear test of the term next preceding that to which it is re-

CHAP. II

act,(h) where it is intended to operate as a supersedeas. If the writ be served after the return day, the service is void; but if served while in force, a return afterwards is good.(i)

No. 2. *Citation.*

Supreme Court of the United States of America.

T. G. Plaintiff in Error,
v.
A. O. Defendant in Error. } Citation.

By B. L. one of the associate justices of the Supreme Court of the United States of America,

To A. O. defendant in error in the above cause:

Whereas T. G. hath lately sued out of the Supreme Court of the United States of America, a writ of *error*, directed to the President of the Senate of the State of New-York, the Senators, the Chancellor, and *Justices* of the Supreme Court of the said State, being *the Judges* of the court for the Trial of Impeachments and the Correction of Errors in the State of New-York, stating that in the record and proceedings, and also in the rendering of judgment or passing the final decree in a certain suit before the said court for the Trial of Impeachments and the Correction of Errors, between the said T. G. appellant in the said court, and the said A. O. respondent in the said court, in a plea upon the petition of appeal of the said appellant in the said court, appealing from a certain order or final decree of the court of chancery of the said state, in the said petition of appeal set forth or mentioned, manifest error hath intervened, to

turnable, and a term must not intervene between the test and return (Hamilton v. Moore. 3 Dall. 371.) But it has been held that a writ issued in September might bear test of the preceding February (now January) term, and be returnable to the next February, notwithstanding the intervention of the August term. Blackwell v. Patten, 7 Cr. 277. When there had been an omission to test the writ on the last day of the term, or on any day whatsoever, the test may be amended by the record of the duration of that term of the supreme court. Course v Stead, 4 Dall. 22. Act 1789 ch. 20, § 32.

(h) 1789, ch. 20. § 23. Wood v. Lide. 4 Cr. 180.

(i) Wood v. Lide, 4 Cr. 180.

the great damage of the said T. G. as he alleges: And whereas, for the correction of that error, in due manner, the said writ has been issued, returnable before the chief justice and associate justices of the Supreme Court of the United States of America, on the *first* Monday of *February* next, at the next stated term of the said Supreme Court, at the city of Washington, being the present seat of the national government. You are therefore hereby cited to be and appear before the said Supreme Court, at the city of Washington, on the *first* Monday of *February* next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New-York, the *twenty-second* day of *January*, in the year of our Lord one thousand eight hundred and *twenty-two*.

(Signed) B. LIVINGSTON.

Citation by whom signed, and when and how served.

The citation (accompanying allowance of the writ of error,) is signed by the chief justice, or judge, or chancellor, of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States,(*a*) the adverse party having at least thirty days notice. The justice or judge signing the citation on the writ of error, must take sufficient security, (as presently noticed,) and the citation (after service) is annexed to the writ of error as part of the return therewith.(*b*)

A citation must be served and accompany a writ of error, otherwise the writ will be quashed.(*c*) It must be served thirty days before the first day of term or sitting of the court, or the court will not take up the cause until the thirty days expire, unless defendant in error shall appear;(*d*) and will not *compel* it to be heard unless the citation had been actually served thirty days before the first day of the term.(*e*) If defendant below intermarry after judgment, and before service of the writ of error, the service of the citation should be on her husband.(*f*)

(*a*) Act 1789, ch. 20. § 25. 1 Story 62.
(*b*) Ib. § 22.
(*c*) 2 Cr. 406. 1 Cr. 365.
(*d*) Lloyd v. Alexander, 1 Cr. 365.
(*e*) Welsh v. Mandeville, 5 Cr. 321
(*f*) Fairfax's Exr. v. Fairfax, 5 Cr. 19.

CHAP. II.

Security / ond to be taken on signing the citation.

Every justice, or judge, signing a citation on any writ of error must take good and sufficient security that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs, if he fail to make his plea good.(g) It need not appear that the judge who granted the writ of error, did, upon issuing the citation take a bond as required by the act. The provision is merely directory, and the presumption of law is, that it is complied with unless the contrary appears.(h) But if the proper appeal bond be not given, (as where the appeal is claimed by all the defendants against whom the decree is made, and the appeal bond is given by one only,) the objection ought to be taken by way of preliminary motion to dismiss the appeal for irregularity, on account of the failure to give the proper bond. It is too late to take the objection at the argument as to the regularity of the appeal.(i)

No. 3. *Bond.*

Know all men by these presents, that we T. G. of Elizabeth-town, in the state of New Jersey, Esquire, and W. G. of Savannah, in the state of Georgia, gentleman, are held and firmly bound unto A. O. of E-T. in the state of N. J. Esquire, in the sum of *five hundred dollars*,(k) lawful money of the United States, to be paid to the said A. O. or to his certain attorney, executors, administrators or assigns, for which payment, well and truly to be made. we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these Presents. Sealed with our seals, dated this —— day of *January*, in the year of our Lord one thousand eight hundred and *twenty-two*.

(g) Act 1789, ch. 20. § 22. 24, 1 Story 61, 62.

(h) Martin v Hunter, 1 Wh. 304.

(i) Mandeville et al. v. Riggs, 2 Peters 482, on appeal from circuit court.

(k) The security must be sufficient to secure the whole amount of the judgment, and is not to be confined to such damages as the appellate court may adjudge for the delay, Catlett v. Brodie, 9 Wh. 553. But the security required to be taken by the justice, the judge, signing a citation on any writ of error, which shall not be a supersedeas and stay execution, must be only to such amount as, in his opinion, shall be sufficient to answer all such costs as, upon an affirmance of the judgment or decree, may be adjudged or decreed to the respondent in error. Act 1792, ch. 68. 1 Story's L. U. S. 373-4.

Whereas, the court for the Trial of Impeachments and the Correction of Errors, in and for the State of New-York, have lately, to wit, on or about the eighteenth day of *January*, in the year of our Lord one thousand eight hundred and *twenty-two*, rendered a judgment, or passed a final decree in a certain cause then pending in the said court, wherein the said T. G. was the appellant in the said court for the Trial of Impeachments and the Correction of Errors, and the said A. O. was the respondent in the said court, upon the petition of appeal of the said T. G. appealing from a certain order, or final decree of the court of chancery of the said State of New-York, in a certain cause wherein the said A. O. was complainant, and the said T. G. was defendant, and in the said petition of appeal set forth or mentioned, and have by their said judgment, or final decree, affirmed the said decree of the said court of chancery for the said State of New-York, whereupon the said T. G. has lately sued out of the Supreme Court of the United States of America, a writ of error directed to the President of the Senate of the State of New-York, the Senators, Chancellor, and Justices of the Supreme Court of the said court for the Trial of Impeachments and the Correction of Errors, holden in and for the said State of New-York, returnable before the chief justice and associate justices of the Supreme Court of the said United States, on the *first Monday* of February next, at the next stated term of the said Supreme Court, at the city of Washington, being the present seat of the national government: Now therefore, the condition of the above obligation is such, that if the said T. G. shall and do prosecute his writ of error aforesaid to effect, and answer all damages and costs if he fail to make his plea good on the said writ of error, from the said Supreme Court of the said United States, then the above obligation to be void, otherwise to be and remain in full force and virtue.

Return of writ of error, citation, and transcript of proceedings.

The original writ of error, and original citation signed by the judge allowing the writ, must be returned to the supreme court,(*a*) and should be transmitted or returned at the return term. If a term intervene, before

(*a*) Wilson vs. Daniel, 3 Dall. 401.

CHAP. II.

its return, it may be non prossed.(b) For the writ it has been held, is a nullity if not returned to the term to which it is returnable.(c) But where the writ was served when in full force, and is returned, but not at the first term, defendant's appearance waives the irregularity of the return.(d) A certiorari will be awarded by the supreme court, upon a suggestion that the citation has been served and not returned (e) By the judiciary act, the judgment or decree of the state court may be re-examined, &c. by the supreme court upon writ of error in the same manner, and under the same regulations, and the writ shall have the same effect as if the judgment or decree had been rendered, or passed in a circuit court.(f) Judgments and decrees, &c. in the circuit court were re-examined, &c. upon a like process as in the circuit upon appeal from district courts. And final decrees, &c. in a district court were re-examined, &c. upon a writ of error whereto was annexed, and returned therewith at the day and place therein mentioned, an authenticated transcript of the record, and assignment of errors, and prayer for reversal, with a citation to the adverse party, signed by the judge of such court or a justice of the supreme court.(g) By a rule of court the clerk of the court to which any writ of error is directed, may make return of the same by transmitting a true copy of the record, and of all proceedings in the cause, under his hand and the seal of the court.(h) And it has been decided that a return of copy of the record under seal of the court, certified by the clerk and annexed to the writ of error, is a sufficient return to the writ.(i) The opinion of the court or the reasons given for its judgment (unless in case of instructions to the jury, spread upon the record by a bill of exceptions) form no part of the record, within the meaning of the 25th section of the judiciary act. Nor are they made a part of the record by the local law of a state, requiring judges to file their opinions in writing among the papers in the cause.(k) The rule, if otherwise, would of course be inapplicable to appeal

(b) Hamilton v. Moore 3 Dall. 371.
(c) Blair v. Miller 4 Dall 12.
(d) Wood v. Lade 4 Cr. 180.
(e) Fuld v Milton 3 Cr. 514.
(f) Act 1789 ch. 20. § 24. § 25.
(g) Ib. § 22.
(h) R. XI. Feby. T. 1797.
(i) Martin v. Hunter, 1 Wh. [illegible] see 9 Cr. 180.
(k) Williams v. Norris, 2 Wh. [illegible]

causes, in which no such proceedings as exceptions, instructions to jury, or assignment of errors take place in the court below. Whether in such case any assignment of errors becomes necessary after return of transcript, appears questionable. The general rule is, that in cases not put to issue at the August term, the plaintiff in error, if errors were not assigned in the court below, must assign them in this court, at the commencement of the term, or so soon thereafter as the record shall be filed with the clerk, and the cause placed on the docket: if he fail to do so, and also fail to assign them when the cause shall be called for trial, the writ of error may be dismissed at his costs; and if defendant refuse to plead to issue, and the cause be called for trial, the court may proceed to hear an argument on the part of the plaintiff, and give judgment according to the right of the cause.(*m*) The following is the form of the transcript and return annexed to a writ of error in case of an appeal.

No. 4. *Transcript of the Record and Return to the Writ of Error.*

In Error. Pleas in the court for the trial of impeachments and the correction of errors held in the senate chamber in the Capitol in the City of Albany on the *twenty seventh* day
L. S. of *March* in the year of our Lord one thousand eight hundred and *twenty*; before the President of the senate, the senators and the justices of the supreme court.

J. F. BACON, Clerk.

T. G. Appellant.
A. B. Respondents.(*a*)

Be it remembered that on the —— day of —— in the year of our Lord one thousand, &c. T. G. the appellant came here into the court for the correction of errors by S. J. jr. and J. V. H. his counsel, and filed his appeal from a decree of the court of chancery of this state in the words following to wit:

(*m*) R. XXI. Feb. T. 1806. of Gibbons and Ogden on their first appeal see, p. 390. n.(a)
(*a*) This was the form in the case

CHAP. II.

That on or about, &c. (copy petition of appeal) To which said petition of appeal the said A. O. on the —— day of —— in the year, &c. came here into the court for the correction of errors by J. O. H. his solicitor and counsel, and filed his answer to the said petition of appeal in the words following, to wit: The respondent not confessing, &c. (copy answer).

And be it further remembered, that the annexed authenticated copies of the bill and affidavit thereunto annexed, and of the order for an injunction thereupon, and of the answer, and replication above mentioned, and of the decretal order of the —— day, &c. above mentioned, were duly certified to this court, and produced, and read at the hearing by the parties above named.

Whereupon afterwards, to wit: on the —— day, &c. the said court for the correction of errors after hearing the reasons assigned by the Chancellor for his order or decree, and the counsel for both parties, did order adjudge, and decree, and they do hereby order, adjudge and decree that the decretal order of the court of chancery *made in this cause*, on the —— day, &c. and *from which order* the appellant in this cause appealed to this court, be, and the same is hereby in all things affirmed, with costs to be taxed, to be paid by the appellant to the respondent, and that the record, and proceedings be remitted to the court of chancery, to the end that the decree may be carried into execution.

Thereupon it being suggested by the counsel for the appellant that a writ of error will be prosecuted by him out of the supreme court of the United States in this cause: It is ordered that the record and proceedings therein be retained in this court, and that unless the respondent shall make up the record of the decree of this court in this cause within twenty days, the appellant be at liberty to do so: And that certified copies of the pleadings and proceedings in the court of chancery, including the deed from D. D. T. and others to the appellant read on the hearing in that court, be attached to the record in this court, and that such pleadings, proceedings, and record be certified in return to such writ of error if the same be brought,

under the seal of this court, and the signatures of the president and clerk of this court.

The answer of the President of the senate of the state of New-York, the senators, chancellor, and justices of the supreme court of the said state, being the judges of the court for the trial of impeachments, and the correction of errors holden in and for the said state of New York, within named.—

The record, process and proceedings of the plaint, whereof mentioned is within made, with all things concerning the same—We certify to the chief justice and associate justices of the supreme court of the United States, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

John Taylor, President.

John F. Bacon, Clerk of the court for the trial of impeachments, and the correction of errors.

Docketing the cause and filing the record thereof. Dismissal of writ of error for neglecting to docket, &c. When the cause stands for trial. Dismissal for not appearing to argue. The order in which causes are taken up on the docket. Death of party pending appeal. Case and points. Decrees of the court. Mandate, &c.

On error or appeal from a judgment or decree rendered *thirty days before the term* to which the writ of error or appeal is returnable, the plaintiff or appellant must docket the cause, and file the record thereof with the clerk of the supreme court, within the first six days of the term; on failure, the defendant or appellee may docket the cause, file a copy of the record, and thereupon the cause will stand for trial, as if the record had been duly filed within the six days; or he may have the cause docketed and dismissed upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the cause, and certifying that such writ of error or appeal had been duly sued out, and allowed (*a*) But the rule to dismiss a writ of error for not filing the record, does not apply where it is filed before the motion is made to dismiss.(*b*) And where an appeal is dismissed for an omission to file a transcript of the record within the time, the appellant may file the transcript during the term, and move to have the appeal reinstated; and an official certificate of the clerk of such dismissal, during

(*a*) Rule xxxii. Supreme Court term 1806. 6 *Wh.* 452. Feb. term 1821. see R. xx. Feb. (*b*) Bingham v. Morris, 7 Cr. 99.

CHAP. II.

the term, would be premature, as its allowance would be to prejudge such a motion.(c) Where the writ of error issues *within thirty days before* the meeting of the court, the defendant may enter his appearance, and proceed to trial; otherwise the cause must be continued;(d) for the court will not take it up where the citation had not been served thirty days before, until that time expires, unless defendant appear.(e) His appearance, as already noticed, has been held to be a waiver of all objection to the irregularity of the return of the writ where it had been served when in full force.(f) If he fail to appear, the plaintiff may proceed *ex parte*.(g) All causes the records of which are delivered to the clerk on or before the sixth day of term, will be considered as for trial in the course of the term; if not delivered till after the sixth day, either party is entitled to a discontinuance,(h) except as before observed, in case of appeal or error where the defendant himself files the record after the six days, in consequence of the plaintiff's neglect.(i) If plaintiff in error do not appear, defendant may have him called and dismiss the writ with costs, or he may open the record and go for an affirmance of the judgment or decree of the court below, and in such case costs go of course.(k) If no counsel appear on either side, when the cause is called, the writ will be dismissed:(l) but not until twice called, passed, and not afterwards reached, according to a rule of court recently adopted as follows:—The court on the second day in each term hereafter, will commence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the term, in the same order; and if the parties, or either of them, shall be ready when the case is called, the same will be heard. And if neither party shall be ready to proceed in the argument, the cause shall go down to the foot of the docket, unless some good and satisfactory reason to the contrary shall be shown to the court. That ten causes only shall be considered as liable to be called

(c) 3 Peters 68.
(d) *R* xvi. Feb. 1803.
(e) Lloyd v. Alexander, 1 Cr. 365.
(f) Wood v. Lide, 4 Cr. 180
(g) R. xv. Aug 1801.
(h) R. xix. Feb. 1806.
(i) R xxxii. Feb. 1824.
(k) Montalet v. Murray, 3 Cr. 249.
(l) Radford v. Craig, 5 Cr. 242.

on each day during the term, including the one under argument, if the same shall not be concluded on the preceeding day. No cause shall be taken up out of its order on the docket, or be set down for any particular day, except under special and peculiar circumstances to be shown to the court. Every cause which shall have been twice called in its order, and passed, and put at the foot of the docket, shall, if not again reached during the term it was last called, be dismissed, and no longer continued on the docket.(*d*)

No orders in the state court, after the removal of the record into this court (not made by way of amendment, but introducing new matter) can be brought into the record here. The cause must be heard and determined upon the record as it stood when removed.(*e*) In all cases of equity in the supreme court, no objection can be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record, as evidence, unless objection was taken thereto in the court below, and entered of record; but the same will otherwise be deemed to have been admitted by consent.(*f*) If, pending the appeal, either party die, the representatives may come in voluntarily, or by order on motion, (and which must be publishe , be compelled to come in, and upon default, the other party may proceed ex parte—if a defendant, to dismiss the appeal—if plaintiff, to open the record, and on hearing have it reversed, if erroneous.(*g*) But where the appellee had died after the commencement of the term, and the court not knowing his decease, had decreed upon the case after argument, the court ordered the decree to be entered as of the first day of the term.(*h*) Causes on writ of error from state courts, are heard upon the transcript of the record returned to the supreme court No other record appears necessary. The general rule of the court is, that no cause will be heard, until a complete record be filed containing in itself, without references *aliunde*, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court.(*i*) A

(*d*) Rule. Jan. Term, 1830.
(*e*) Williams v. Norris 12 Wh. 117.
(*f*) R. xxxv. Feb. T. 1824.
(*g*) See in extenso the rule 31 of the supreme court, Feb. Term. 1821.
(*h*) Bank of U. S. v. *Weisiger*, 2 Peters, 481.
(*i*) R. xxxii. Feb. T. 1823.

CHAP. II.

case also for each party and points are required by other rules of the court. No cause standing for argument will be heard, until the parties furnish the court with a printed brief or abstract of the cause, containing the substance of all the material pleadings, facts, and documents, on which the parties rely, and the points of law and fact intended to be presented at the argument.(*j*) Two counsel only are permitted to argue for each party, plaintiff and defendant, in a cause.(*k*)

No. 5. *Decree of Reversal.*

[Case of Gibbons v. Ogden. 9 Wh. 1. reversing, 17 J. 488; see the decree of the court of errors *ante* p. 387.] This cause came on to be heard on the transcript of the record of the court for the trial of impeachments and correction of errors of the State of New York, and was argued by counsel: on consideration whereof, this court is of opinion, that the several licenses to the steam boats 'The Stoudinger,' and 'The Bellona,' to carry on the coasting trade which are set up by the appellant, T. G. in his answer to the bill of the appellee, A. O., *filed in* the court of chancery for the State of New-York, which were granted under an act of congress passed in pursuance of the constitution of the United States, gave full authority to those vessels to navigate the waters of the United States, by steam or otherwise, for the purpose of carrying on the coasting trade, any law of the State of New-York to the contrary notwithstanding; and that so much of the several laws of the State of New-York as prohibits vessels licensed according to the laws of the United States from navigating the waters of New-York by means of fire or steam, is repugnant to the constitution, and void. This court is therefore of opinion, that the decree of the court of the State of New-York for

(*j*) R. xxx. supreme court, Feb. T. 1821. The court must be furnished with a statement of the material points of the case from the counsel on each side R viii. Feb. 1, 1795. Unless statements of the case are furnished pursuant to the rules, the causes will be either dismissed or continued. Peyton v. Brooke, 3 *Cr.* 92. If the appellant's counsel neglect to furnish the court a statement of the points, pursuant to the rule, the appeal will be dismissed. The Catharine v. U. S. 7 *Cr.* 99.

(*k*) R. xxv. Feb. T. 1812. *See* 4 *Wh.* 316, 322. n. (*a*)

the trial of impeachments and the correction of errors affirming the decree of the Chancellor of that state, which perpetually enjoins the said T. G., the appellant, from navigating the waters of the State of New-York with the steam boats 'The Stoudinger,' and 'The Bellona,' by steam or fire, is erroneous, and ought to be reversed, and the same is hereby reversed and annulled. And this court doth farther direct, order, and decree, that the bill of the said A. O. be dismissed, and the same is hereby dismissed accordingly.

I. Elias B. Caldwell, Clerk of the Supreme Court of the United States, do hereby certify, that the foregoing is a true copy of the order and decree of the said Supreme Court in the above-mentioned cause of T. G. and A. O.

In testimony whereof I have hereunto set my Hand, and affixed the Seal of the said
L. S. Supreme Court, this *twelfth* day of March, in the year of our Lord one thousand eight hundred and *twenty-four*.

E. B. CALDWELL, Clerk.
Sup. Ct. U. S.(*l*)

No. 6. *Decree of Affirmance with Costs.*

This cause came on the transcript of the record from the court for the Trial of Impeachments and Correction of Errors, for the State of New-York, and was argued by counsel; on consideration whereof, it is ordered and adjudged by this court, that the judgment [or decree] of the said court for the Trial of Impeachments and Correction of Errors, for the State of New-York, in this cause, be, and the same is hereby affirmed, with costs.(*a*)

Reversal, affirmance, costs, damages, mandate.

When the judgment, or decree, shall be reversed, the court must proceed to render such judgment, or pass such decree, as the state court should have rendered or passed, except where the reversal is in favor of the plaintiff or petitioner in the original suit, and the damages

(*l*) The reporter of the supreme court, to whom the *opinion* of the court after being read are delivered, is the proper person to apply to for certified copies of an *opinion*. It is not filed with the clerk, but the clerk may certify, under the seal of the court, that the former officer is the reporter, if this should also be required. 3 Peters, 397.

(*a*) 3 Peters 291.

CHAP. II.

to be assessed, or matter to be decreed, are uncertain, in which case they shall remand the cause for a final decision. And the Supreme Court shall not issue execution in causes that are removed before them by writs of error, but shall send a special mandate to the state court to award execution thereupon.(*b*) Where upon such writ of error the Supreme Court shall affirm a judgment or decree, they shall adjudge or decree to the respondent in error just damages for his delay, and single or double costs at their discretion.(*c*) On revising the judgment of the highest court of appeals (in Virginia,) in a cause involving a construction of the treaty of peace with Great Britain, which that court had decided against the title claimed under the treaty, by reversing and annulling the previous judgment in the inferior court, the Supreme Court decided that the judgment of the high court of appeal being revised, becomes a mere nullity; and costs must follow the right as decided here. That the judgment of the inferior court be affirmed. That the costs of the state courts and in this court, be allowed plaintiff in error, and that the mandate for execution issue to the inferior court.(*d*)

No. 7. *Mandate.*

Mandate on affirmance.

United States of America, ss.

The President of the United States of America, to the Judges of the court for the Trial of Impeachments and the Correction of Errors of the State of New-York, greeting:

L. S.

Whereas, lately in the court for the Trial of Impeachments and the Correction of Errors, of the State of New-York, before you, or some of you, in a cause wherein — and —, were appellants, and — and —, were respondents, in appeal. It was considered by the said

(*b*) Act 1789, ch. 20. § 24. 25.

(*c*) Act 1789, ch. 20. § 23. 25. 3 Dall. 54. Damages where writ of Error was sued out for mere delay are ten per cent. on the amount of the judgment; but where a real controversy exists, six per cent. In both cases the interest is to be computed as part of the damages. Rule of court, 17. 18. see 3 Dall. 302.

(*d*) Clarke v. Harwood, 3 Dall. 342.

court, that the order or decree of the court of chancery should be affirmed, and that the said appellants should pay to the said respondents, their costs in and about their defence to be taxed, and that the record should be remitted to the court of chancery to be proceeded upon according to law. as by the inspection of the transcript of the record of the said court which was brought into the Supreme Court of the United States, by virtue of a writ of error, agreeably to the act of Congress in such case made and provided, fully and at large appears. And whereas in the present term of January, in the year of our Lord one thousand eight hundred and ——, the said cause came on to be heard before the said Supreme Court, on the said transcript of the record, and was argued by counsel; on consideration whereof, it is adjudged, ordered and decreed, that the decree of the said court for the Trial of Impeachments and the Correction of Errors in this case be, and the same is hereby affirmed with costs. You, therefore, are hereby commanded that such execution and proceedings be had in said cause, as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding. Witness John Marshall, chief justice of said Supreme Court, the *second Monday* in *January*, in the year of our Lord one thousand eight hundred and *twenty-seven*.(a)

WILLIAM THOMAS CARROLL,
Clerk of the Supreme Court
of the United States.

Defendant's Costs:

Clerk	$14 03
Attorney	20 00
	$34 03

Taxed by WILLIAM THOMAS CARROLL,
C. S. C. U. S.

Further proceedings after mandate.

The court will not grant a re-hearing in an equity cause, after it has been remitted to the court below to carry

(a) The above form is slightly altered from that of a mandate issued on affirmance of a *judgment* of the Supreme Court of this State, brought up by writ of error to the court of Errors, and thence to Supreme Court of U. S.

CHAP. II

into effect the decree of this court, according to its mandate.(a) Instead of remanding the cause for a final decision, as before provided, [p. 423-4] the court, may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution.(b) If a cause has been remanded, and the state court decline or refuse to carry into effect the mandate, the Supreme Court will proceed to a final decision of the cause,' and itself award proceeding thereon. In one instance, however, from *public* policy, as observed, p 406.] a second appeal was sustained, as in a case where the act authorising appeal was drawn in question and denied, when the court reviewed the former opinion, and re-asserted its jurisdiction.(c)

No. 8. *Decree by the Court of Errors pursuant to the Decree and Mandate of the Supreme Court of the United States.*

Decree by the court of errors (pursuant to the decree and mandate of the supreme court of U. S.) reversing with costs a form. or decree of the court of errors which had affirmed the decree of the court of chancery, and reversing also the said decree of the court of chancery. Remittitur and proceedings thereon in the court of chancery.

[Caption and title as in p. 359.] On reading the mandate of the supreme court of the United States to this court and which is filed; and it appearing thereby, that the decree of this court, affirming the decree of the court of chancery of the state of New-York, rendered in favor of the above named ——, against the said ——, is adjudged by the supreme court of the United States to be erroneous in this, that the said decree sustains, &c it being the opinion of the said supreme court of the United States, that the license of the Steam Boat Bellona, granted under an act of congress, passed in pursuance of the constitution of the United States, gave full authority to navigate the waters of the United States by steam or otherwise, for the purpose of carrying on the coasting trade, any law of the state of New-York notwithstanding; and it further appearing, that the said decree of this court hath been, and is reversed, and annulled by the said supreme court of the United States; and that it hath been, and is further ordered, adjudged, and decreed by the said supreme court of the United States, that the

(a) Browder v. McArthur. 7 Wh. 60. see also 7 Cr. 1.
(b) Act 1789, ch. 20. § 25.
(c) See Martin v. Hunter's lessee, 1 Wh. 353. Fairfax v. Hunter, 7 Cr. 603. see 10 Wh. 431.

said decree of the court of chancery of the state of New-York be reversed and annulled, and that a decree be rendered that, &c. Wherefore this court is directed that such proceedings be had in this cause as according to right and justice, and the laws of the United States, and agreeably to the said opinion of the said supreme court of the United States, ought to be had, the said writ of error notwithstanding; and on motion of Mr. ——, of counsel for the said ——the appellant: It is ordered, adjudged, and decreed, that the decree heretofore rendered by this court, whereby it was ordered, and decreed by this court that the decree aforesaid of the said court of chancery of the State of New-York should be affirmed; and whereby it was further ordered and decreed by this court, that the respondent should recover against the appellant his costs in defending the said appeal in this cause to be taxed, and which decree of this court hath been reversed and annulled by the supreme court of the United States, be and the same hereby is reversed and annulled by this court in conformity to the judgment and decree of the said supreme court of the United States, reversing and annulling the same. And it is further ordered, adjudged and decreed by this court, that the decree of the court of chancery of the state of New-York in favor of the said ——, against the said ——, be, and the same hereby is in all things reversed and annulled; and it is further ordered, adjudged, and decreed by this court that the said decree heretofore affirmed by this court, be, and the same is hereby reversed with costs, and that the said —— be restored to what he has lost thereby. And it is further ordered, adjudged, and decreed that the appellant recover against the respondent his costs of prosecuting his appeal(*a*) in this cause to be taxed. And it is further ordered that the record and proceedings in this cause be remitted to the said court of chancery, that the said decree of this court may be executed.

(*a*) 'Writ of error in this cause' &c. were the words of the form from which the above is taken. The original form was on reversal of a *judgment* of the *supreme court* of this state, in the case of Vanderbelt v. Livingston, Oct. 7, 1826.

CHAP. II.

Further proceedings, re. mittitur, &c.

The remittitur to the court of chancery, it has been presumed had been staid in the court of errors, prior to the appeal to the supreme court of the United States; [see the order in that case p. 389.] for if not, the writ of error and mandate would have been directed to the court below. [p. 389.] On filing the remittitur and entering the above order, the clerk of the court of errors will continue the former remittitur [see form p. 394.] with a brief description of the appeal to and mandate of the U. S. court; and include the order thereupon of the court of errors. The remittitur being presented, and filed in the court of chancery, an order is obtained and entered, as directed [p. 395] If the cause had been also brought to that court by appeal from a Vice Chancellor, or from an inferior jurisdiction, a Surrogate court for instance (in which it is possible, questions might arise which would send the cause through all those courts,) the order of the court of chancery would then be remitted to the court below, and the further proceedings in the suit, conducted in conformity with the order or decree of the court above.

COSTS.

§ 80.
V. 1. p. 75-7.
Costs in general.

Costs (except in cases fixed by statute,) are given or withheld from the successful party in the discretion of the court. But the course is uniform, where the question raised is a fair one, and difficult for the parties to settle themselves, not to give costs against the unsuccessful party (*a*) The defendants who obtained a deed from the complainant's ancestor when he was in a state of intoxication, were charged with the costs of the suit to set aside the deed. (*b*) In a suit for divorce, where the husband suffers a decree *pro confesso*, costs follow of course. Where the wife obtains a divorce upon the ground of adultery, a reasonable counsel fee may be allowed, and taxed with the other costs against the husband.(*c*)

(*a*) Per Cowen, V. C.-Ch. 9 Cowen 748, 775-8.
(*b*) 2 Paige 30.
(*c*) 2 Paige 62.

No. 1. *Decree for Costs on Discovery, no sufficient demand having been made before suit brought.*(a)

[Caption, &c. § 32. p. 78. Foster and others v. Hall & Hoyt. Before Ch. Jones, March 19, 1827.]

A motion having been heretofore made in this cause, on the part of the defendants, for the dissolution of the injunction heretofore granted to stay the proceedings of the defendants in a suit at law, and for the payment by the complainants to the defendants of their costs in this court; and counsel having been heard and the matter fully argued, and the motion to dissolve the injunction having been granted and the question of costs reserved, and the question so reserved having been fully considered by the Chancellor, and it appearing that the bill was filed for a discovery of matter to be used as evidence on a trial at law between the parties, and that before the filing of the bill an application was made by the complainants to the defendants, for an admission by them of the facts of which a discovery is sought by the bill, and with the intent of using such admission as evidence on the trial aforesaid; and that the discovery and admission so applied for were not refused by the defendants, but that a reasonable time was required by them to prepare their answer to the application so made to them, and that the complainants filed their bill without allowing to the defendants such reasonable time as was required for answering the application of the complainants, and no sufficient cause being shown for exempting the complainants from the general rule in relation to costs on bills of discovery when such bills are fully answered, it is ordered that the complainants do pay to the defendants their costs to be taxed, and that if the same be not paid within twenty days after they shall be demanded, that the defendants have execution therefor against the complainants.

(a) See vol. 1. p. 76. *Note*, the the words 'petition' and 'bill,' in the third line of that page are transposed.

CHAP. II.

§ 81.

V. 1. p. 78-81. Costs, bills of costs, schedule of fees, &c.

No 1 General form of bill of costs.

No. 2. Do. on foreclosure, &c.

No. 3. Do. where suit settled after service of subpœna.

No. 4. Do on attachment.

No. 5. Do. on special motion for payment out of fund in court of money paid for taxes.

No 6. Do. on petition.

No. 7. Costs of opposing motion founded in petition.

No. 1. *General Form of Bill of Costs.*

In Chancery:

Before the (Vice) Chancellor, (of, &c.)

A—— B——
v.
C—— D——.

Costs for complainant (or petitioner *or* defendant,) on taking the bill as confessed, (*or* on decree upon bill and answer,) *or* pleadings and proofs, &c. *or* on making *or* opposing a motion, &c.(*n*)

Taxed off or disallowed,	*Solicitor.*		$	$
$3 00	Oct. 15, 1830.	Retaining fee,(*a*) J. A. C. Solicitor - - -	3 00	

(*n*) The Solicitor's and counsel's fees were blended in the schedule given in the first vol. (p. 78, &c.) But they are here presented sepafately, as well as the fees of other officers of the court. Perhaps this is the most convenient mode of *framing* a bill of costs. The items are, however, in the *present* form, presented without regard to any particular suit, but for the purpose of pointing out some recent constructions of the fee bill. A bill of costs *regularly* made out, is a history of the suit, and as such constitutes one of the best guides that could be adopted in practice. The minute practical direction contained in a well drawn bill of costs, is seldom found in any treatise, or if so, not in a condensed form. Precedents of bills of costs in this work, will be found arranged under their appropriate heads, in the subsequent chapters.

(*a*) In the matter of the petition of E. Johnson, concerning a suit at law by the receivers of the Bank of Niagara, [see No. 7, *post*,] June 1830, the motion being denied with costs, the bill of costs of the receivers for opposing the motion was submitted to the taxing master of the third circuit, Julius Rhoades, Esq. who decided as follows:—

If this proceeding is not to be considered and treated as a *cause*, no retaining fee for counsel can be taxed. The same remark applies to proceedings against lunatics and drunkards, for the sale or mortgaging of church property, for the sale of estates of infants, and for the appointment of general guardians. 2 R. S. 629 § 14 Subdivision 1st, is 'a retaining fee to not more than one counsel *in a cause*, five dollars; 2 R. S. 630, § 15 Subd. 1st, is *Solicitor's* fees, 'For a retaining fee, three dollars, [the word

Taxed off,		Brought over.	£	s	CHAP. II.
£		Draft instructions to clerk of ——, &c. to search for judg-			

cause is here omitted.] Chan. Kent, in his remarks on the fee bill of 1818, prepared by him, treats *a cause* and *a suit* as synonimous, 1 ed. Blake, 115 appx. I am inclined to think that this is not a case in which a retaining fee could be charged within the spirit and meaning of the act of 1818. But a difficulty arises under the revised statute in consequence of an alteration in the phraseology of subdivision 2d of § 15 above referred to, which is as follows: 'Drawing every bill, &c. *in a cause*, 28 cents for every folio.' If this proceeding is not to be treated *as a cause*, then there is nothing in the fee bill authorising the taxing officer to allow the Solicitor for drawing and engrossing the affidavit to oppose the application; and the receivers are without remedy. In the act of 1818, the allowance for similar services was not confined to *a cause*, but was left general As I cannot think the legislature intended to restrict the allowance for drawing and engrossing papers necessarily prepared to be used in the court to *suits*, I must decide that this is a cause within the meaning of sec. 15, Subdiv. 2d above referred to. I shall therefore allow the retaining fee for Solicitor and counsel, if separate persons were actually retained in good faith; and I shall also allow the Solicitor for drawing and engrossing the papers necessarily used in opposing the application of the petitioner. The fee for copies of the bill of costs, and taxing costs, depend upon the same question.

The question was submitted to the Chancellor, whose decision was this:

'The charges for retaining fees ought not to be allowed in this case. If there is any cause in court, it is the original cause in which the receiver was appointed, and this was in the nature of a special motion for instructions to the receivers in that case as officers of the court. It is not a case in which the legislature contemplated retaining fees to be allowed to counsel or Solicitor in opposing the motion. The usual allowance of costs, as on a special motion only, should be taxed. In the ordinary application for commissions of lunacy, &c. where a Solicitor is actually employed to conduct the proceedings, a retaining fee is to be allowed to him, but a retaining fee to counsel is only allowed in a cause strictly so called, as where there is an adversary suit, or complainant and defendant.' The rule seems to be therefore, that in collateral petitions or motions, that is, those in a suit in which one general retaining fee had been allowed, no other retainer is taxable. But in *original* petitions or motions [*post* ch. v.] a retainer for Solicitor is taxable, and if litigated or contested, a retainer also for counsel when actually employed.

CHAP. II. Taxed off, $			Brought over. $	$
		ments, &c. fol. 1, 28 cts. Copy, 7 cts.(*b*) -	0 35	
		Do. to clerk of, &c. do. secretary of state, &c. - -		
		Do. to register of deeds, &c. of, &c. fol. —. Copy of same, with copy of boundaries, fol. —. - - -		
		Dr. Bill (*or* petition, &c.) fol. —, at 28 cts. - -		
0 84	Nov. 1.	[Dr. Jurat fol. 2, and engrossing 84 cts.](*c*) - -		
		Dr. Special affidavit annexed to bill or petition, fol. —, engrossing, &c. — copies.		
		Abbreviating bill, &c. for use of counsel, fol. —, at 3 cts.		
		Engrossing bill, &c. (with boundaries or other matter, *in hæc verba*,) fol. —, at 14 cts. - - - -		
		Copy for use of counsel, fol. —. Copy to serve —.(*d*) -		

In another case of costs of complainant on neglect of defendant to comply with an order, [*post* No 4.] the same taxing master decided, that in proceedings on attachment, no retainer for Solicitor and counsel can be allowed in the proceedings in the name of the people.

(*b*) This is taxed by the Vice-Chancellor of the first circuit, as a necessary proceeding in the cause.

(*c*) The jurat must be charged with the bill or petition, not separately. Stafford v. Bryan, 2 Paige 46. But this of course does not exclude draft, engrossing, oath, and copies of any special affidavit annexed to the bill or petition.

(*d*) The draft, and two copies of the bill, answer, &c. in addition to the engrossed copy to file, are taxable. Stafford v. Bryan, 2 Paige 46. Bearing in mind that the fee for drafting is double that for engrossing, and this double that for copying, an easy mode of carrying out the items, when the number of folio in the draft and engrossment are the same, is to multiply the draft folio by 4 and 7, and halve the products. Another hint may be offered for the purpose of facilitating this necessary, but irksome part of professional duty, viz. in paging all the original papers in the cause, let each page contain one folio of one

Taxed off,		Brought over.	$	$	CHAP. II.
		Copy petition for Chancellor, (e). Copy of pleadings, &c. for the court on hearing, (f) ol. —. - - -			
0	42	Dr. Written request for clerk to enter common order that subpœna issue, fol. 1, 28 cts. and engrossing, 14 cts. (g) *or* notice to register, &c. to fill bill, enter order, and issue subpœna. (h) -			
		Dr. Notice of object of suit to serve on defendants, fol. —. Engrossing to file with affidavit of service, — copies for defendants, at — each; and			

hundred words. The papers must be paged, the folio counted, and if both be done at one operation, the greater part of the labour of making up the costs will have been performed. But further, if the Solicitor should, upon finishing every service, carry out the appropriate fee in his register, the trouble of making the bill will be reduced almost to a mere copy from his minutes in the cause.

(e) This would not be necessary except, perhaps, in every special and contested case. The original petition is not filed until it is presented or read in court. In England, this item is allowed in bankrupt petitions. See bills of costs in those cases, 1 Mont. and Mac. 147, &c.

(f) These copies are required, by rule of court on argument or hearing in contested causes.

(g) This has been taxed in some instances. But the Vice-Chancellor of the first circuit rejects it, as another name for a præcipe, which is abolished, and on the ground that the Solicitors may draft the common orders, and therefore the *request*, as an authority to enter them, is unnecessary. But though the Solicitors may, if they please, *draft* the common, as well as special orders [2 R. S. 630. 627 R. 6.] yet they usually allow the Register, Assistant Register, or Clerk, to draft, as well as enter such orders, and the latter officers, as an act of reciprocal liberality, charge, of course, no fee for filing the written request, required by them as authority for entering such order.

(h) This has been allowed by the taxing master of the third circuit: but if the decision of the Vice-Chancellor of the first be correct, the charge is not perhaps taxable.

CHAP. II.	Taxed off,		*Brought over.*	$	$
	$		Dr. Notice of the commencement of the suit (or *lis pendens*) ——, engrossing same with boundaries, fol. —.(i)		
			Attending on entering order that subpœna issue, 50 cts. Dr. subpœna, fol. —, engrossing and — copies to		

(i) Neither of these notices come within the description of three shilling notices and such, it is understood, is the Chancellor's impression, notwithstanding one of those notices, viz. 'Notice of object of suit for defendant and service, 37 1-2 cts. is put down as such, in the form of the bill of costs appended to the rules of court, p. 100-1. The point, however, is not without a decision. It was raised and decided, by Ch Jones, on appeal to him from the taxation of costs, in Porter, trustee, &c. and others v. M' Kinlay and others, August 1826, that 'The copies of notice of the object of suit, to annex to the affidavits of service, being to be filed, I see no objection to the charge for engrossing them, and the original charge for that service is to stand. The charges, (75 cents each,) for serving the notices of the object of the suit must be disallowed, and the deductions of the taxing master of these charges is to prevail. The charge of twenty dollars paid W. J. D. being for the service of the notices of the object of the suit, which is not provided for by the fee bill, as well as the service of subpœnas, and having been actually paid is allowed, as a disbursement actually and necessarily paid in the progress of the suit, and the entire charge is to stand as originally made, without any deduction therefrom. The deduction from the charge of expenses to F. and A. to serve subpœnas must prevail—the fee bill makes provision for the service of subpœnas, which the residue of the original charge, after the deduction of the taxing master therefrom, fully covers: and no further allowance can be made as a disbursement actually and necessarily paid or incurred, unless under very special circumstances, and on full proof of the necessity therefor.' Such was the decision of Ch Jones.

In a recent case of taxation before the taxing master of the third circuit, in the cause of the Mechanics Ins. Co. of the city of Albany v. Cuyler and others, the following was his decision: "If the notice of the object of the suit and of its commencement are to be taxed by the folio, then they must be considered as in the nature of a statement, and there is no allowance in the fee bill for serving it. The allowance in the fee bill is, 'Every necessary notice or summons, including a copy thereof and service, thirty seven and a half cents.'" If these are to be

Taxed off,			Brought over.		CHAP. II.
$			$	$	
		serve —. Service (j) —. Affidavits of service —, or admission of service —, and			

considered as such notices, then the charges for drawing and engrossing and the copies (which were actually made in this cause) cannot be allowed. I am of opinion that they should, in all cases, be charged by the folio. The remarks of Ch. Kent appended to the charge for notice of service in the fee bill prepared by him in 1818, see Blake 1st ed. app. 120, I consider do not apply to these notices, but simply to the notices served by one Solicitor upon another Solicitor, in the progress of the cause.

The notice of the commencement of the suit first became necessary in consequence of the provision of the act of 1823, 46th Sess. Laws, p. 213. § 11 and the notice of the object of the suit, grew out of the provisions of the 122d of the old rules of this court, adopted Dec. 10, 1824. Both of these notices, therefore, were unknown in practice at the time the fee bill was framed. The revisers, as appears by their note to the Solicitor's fee bill, as reported by them, [Revisers Reports, part 3. ch. x. Tit. 3. § 16. p. 32.] adopted the fee bill of 1818, without alteration, except as to the length of folio and the disbursements in a cause. I therefore consider the notices of the commencement of the suit, and the notice of the object of the suit, each as a proceeding in the cause to be charged by the folio, under the provision of 2 R. S. 630, § 15 paragraph 2d, and allow it accordingly: but nothing can be allowed for service thereof, unless it be as a necessary disbursement in the progress of the cause, which is not pretended to have been incurred in this case.

(j) In the Mechanics Ins. Co. of Albany v. Cuyler and others the taxing master of the third circuit rejected the *draft*, but retained the *engrossment* of one other subpœna. 'I am of opinion,' says Mr. Rhodes, in his decision 'that but *one draft* of a subpœna (and so of all process under 2 R. S. 651. § 1..) can be allowed in the same cause unless new parties should be made to the bill by amendment. The necessary number of *engrossed* copies to be *sealed*, are properly taxable; but the simple fact, that the second subpœna is tested and made returnable on different days from the first, cannot, I think, make a new draft necessary.' So also, 'husband and wife must, in this case, be considered as one person, and no copy was necessary for the wife.' (See 2 J. Ch. 139. Ferguson v. Smith and others.) As to allowance for disbursements for serving notice with subpœna, see note (i) the allowance in that case was for the notice, and nothing as a disbursement for serving the subpœna. The fee for *serving* a subpœna or injunction, is 75 cents. 2 R. S. 630. This is the specific provision; but if in order to

CHAP. II.	Taxed off, $		*Brought over.* $	$
			affidavits of signatures to admission.(*k*) - -	
			If other parties being discovered as interested, it became necessary to amend the bill, add the order for amendment, attending entering same. Dr. Amendments, fair copy, abbreviating, engrossing, copy to serve, serving same and notice, copy to serve with notice on other Solicitors, subpœna against new defendants, engrossing, copies to serve, Dr. new notice of object of suit, and of *lis pendens*, engrossing with boundaries, copies to serve on new parties, affidavit of service, &c. and copy affidavit to preserve.(*l*) - - -	

effect such service, disbursements are unavoidably incurred by the Solicitor, as where the parties reside, for instance, in remote parts of a county and a special messenger becomes necessary, it is a case not provided for or contemplated in the fee of 75 cents merely given for the service itself. and therefore it seems that such disbursement might be allowed to the Solicitor under the subsequent clause of the statute providing for actual disbursements. 2 R S. 634 § 20.'

(*k*) 'Affidavit of service of the notice of the object of the suit, must be included in the affidavit of service of the subpœna, as the service of both constitute but one act.' Per J. Rhoades, taxing master, in The Mech. Ins. Co. &c. v. Cuyler.

'The charge for draft and engrossing affidavit of signature to admission,' (in this case of two of the defendants, of service of notice of the object of the suit) as the service was performed, and appears to have been done in good faith by the Solicitor as necessary or advisable, it is allowed, and the original charge, (viz. Dr. folio 3, and engrossing) is to stand.' Per Ch. Jones: Porter, trustee &c. v. McKinlay, August 18, 1826. A similar charge is allowed in taxation by the Vice-Chancellor of the first circuit; see *post* No. 2.

(*l*) These fees were allowed and taxed by Thos. Bolton, Esq. late taxing master in the city of N. Y. in the cause of the Bank

Taxed off, $		Brought over. $	$
		In case of reference: Attending register entering order, 50 cts.; copy order to preserve —. Service of office copy of order on master, 25 cts. Draft and copy of — summonses and service, 37 1-2 cts. each. Attending Master and obtaining summonses on matter referred, not argued, 50 cts. Copy summons to swear to, fol. —. Affidavit of service, fol. —, and copy —. Dr. charges for Master, fol. —, and copy —. Attending upon return summons, 50 cts. Attending on matters (not an account, see vol. 1. p. 80.) referred (argued) $1. [Attending — days upon different hearings and adjournments of the matter referred.(*m*)] Attending Master	

of America v. Brower and others. Nov. 11, 1825. See note *k*, and as to the mode of making amendments and to what extent they are taxable, see 2 Paige, 46, 159.

(*m*) An allowance for every days attendance on an order of reference, is improper. This was, by a former Chancellor, made an express ground of complaint to the executive against the conduct of certain Masters who continued to tax the same, notwithstanding the decision of the court to the contrary. (Assembly Jour. 28 Jan. 1812, p. 11.) Fulton Bank v. Beach, 2 Paige 190.

The Solicitor's fee for arguing before a master on a reference to take and state an account, $2 50. It was the same in the fee bill of 1818. If by the above decision it is intended to exclude an allowance for different hearings before the master, and to limit it to a single hearing, cases of very great hardship would arise, unless the Chancellor should, as no doubt he would, in such instances, allow such a reasonable counsel fee in the cause as would afford some indemnity for professional services. 'I have known,' observes Ch. Kent, in remarks to the former

CHAP. II. Taxed off,			Brought over.	$	$
			on making his report on the matter referred, 50 cts. Dr. and copy of — summonses to settle report, 37 1-2 cents each, —. Copy summons to swear to fol. —. Dr. affidavit of service and copy —. Attending upon return summons on settling report, 50 cts. Attending for his report, 50 cts. Copy report to preserve, fol. —. -		
			In case of hearing, attendance on hearing, $5. [Do. on motion for confirmation, $1. Do. for sale. Do. for distribution, &c. Do. for costs. Do. to let purchaser into possession, &c.(n)] -		
			Dr. costs, fol. —.(o) Copy of bill of costs delivered with notice of taxation, $1. Copy to file, $1. Taxation, attendance, &c. - -		
			Postage, printing, and other disbursements. Dr. affida-		

fee bill, see Blake 122, appx.] 'a single cause upon reference, to consume fifty-seven different hearings, and most of them were probably more fatiguing than a trial at law at the circuit. And in those cases he admits that the Solicitor would be very frugally paid by this allowance.

(n) The allowance of separate Solicitors and counsel fee as to every distinct point or direction contained in an order or decree of this court or court of errors, is illegal. Fulton Bank v. Beach, 2 Paige 189-90.

(o) The *draft* costs is taxed by the Vice-Chancellor of the first circuit. The taxing master of the third circuit also remarks, that 'Drawing bill, costs I allow, because the statute requires it to be done before the decree can be enrolled.' But in the recent case of Stafford v. Bryan, 2 Paige 46. 52. the Chancellor decides that the allowance is improper.

Taxed off, $		Brought over.	$	$
		vit of disbursements, engrossing, &c. (p) -		
		Solicitor's fees. Total,		50 8
	Counsel fees.	Retainer $5. (J. R. of counsel) perusing, amending, and signing bill, $2 50; and so of the other counsel fees—on special motion—hearing—reference—perusing, &c. decree, &c. see v. 1. p. 79-80, and forms *post*.		
		Counsel fees. Total,		11 0
	Register, &c.	Register, assistant register, and clerk, filing bill, entering order that subpœna issue, sealing subpœna, &c. see ib. and 2 R. S. 627. 629.		
		Register's fees. Total,		10 6
	Master.	Signing summonses at 12 cts. each. Attending at the time and place assigned for hearing and adjourning same, $1. &c. see 2 R. S. 624-6.		
		Master's fees. Total,		17 8
	Sergeant at-arms.	Fee on hearing, 50 cts. from bill filed in the city of New-York or Albany, 12 1-2 cts. 2 R. S. 629, - -		
		Sergeant's fees. Total,		
	Sheriff.	Serving attachment, &c. see *post* No. , - -		
		Sheriff's fees. Total,		7 11
	Commissioner.	Swearing complainant to bill, 12 1-2 cts. Taking affida-		

(p) When services are disputed, the Solicitor should produce his papers, affidavit or other legal evidence, to show that the service was actually and necessarily performed, and the number of folios correctly charged. The onus to the contrary will then be on the opposite Solicitor. The affidavit, or other evidence, will then be added as a taxable item.

CHAP. II. Taxed off,		Brought over.	$	$
		vit of service of subpœna, &c. 12 1 2 cents each. 2 R. S. 637. - -		
		Commissioner. Total,		1 0
	Vice-Ch. &c.	Vice-Chancellor, or Master, taxing costs, &c. 2 R. S. 624-6, - - -		
	Examiners clerk, &c.	See form, No. 2, and 2 R. S. ch. x. Total; - -		
		Sum Total of all the fees, -		90 8

No. 2. *Costs on Foreclosure, &c. on Decree Pro Confesso.*(a)

In Chancery:

Before the Vice Chancellor.

———, ———, v. ———, ——— } See Title and general Form No. 1.

July —, 1830.	*Solicitor:* Retainer, $3. Four draft instructions to clerks of courts for searches, 1 fol. each, and copy, $1 40. Do. to Register, 70. Dr. Bill, fol. —. Copy for counsel, —. Abbreviating, —. Engrossing, —.
Taxed off, $00 42	[Written request or authority for order that subpœna issue, fol. 1 and engr. 42 cts.] Attending entering order, 50 cts. Dr. and copy subpœna, fol. 2, 84 cts. Copy for defendant, 14 cts. Serving, 75 cts. Dr. notice of object of suit, fol. 8, $2 24. Copy to serve 56 cents. Copy to swear to, $1 12. Draft affidavit of those services, (of copy sub. and notice) fol. 4, $1 68. Dr. notice lis pendens fol. 11 and copy, $4 62. Dr. affidavit of no appearance entered or answer filed by deft. fol. 2 and copy,
00 42	84 [Request for order to appear, fol 1 and copy, 42 cts.] Attending entering order to

(a) The items in this bill were taken from two bills which were taxed by the Vice-Chancellor of the First Circuit. See also form No. 1, and notes.

Brought over.

Taxed off, $

appear, 50 cts. Attending on order to take bill as confessed, 50 cts. Attending on entering order of reference, 50 cts. Serving order on Master, 25 cts. Draft charges to lay before Master, fol. 4, and copy, $1 16 Attending Master on computing amount due, 50 cts. Do. on settling his report, 50 cts. Do. for his report, 50 cts. Copy Master's report to preserve, fol 8, 56 cts. Notice of issue and service for clerk, 37 1-2 cts. Draft affidavit of regularity of proceedings, fol 3, and copy, $1 26. [Brief on hearing, $2.] Attendance on hearing, $5. [Attendance on motions, viz. for confirmation, $1. For sale, $1. For costs, $1. For distribution, $1. To let purchaser into possession, $1.] Attending on motion to deliver up lease, &c. $1. Draft order thereon, fol. 12, and copy, $4 7. Attending entering order, 50 cts Copy order to preserve, fol. 12, 84 cts. [*or* Dr. orders thereon, fol. 18, and copy, $7 56. Attending on entering, 50 cts. Copy to preserve, $1 26.] Serving on Master, 25 cts. Attending Master for his report of sale, 50 cts. Do. for payment of amount due, 50 cts. Attending entry of order to confirm, 50 cts. Dr. Master's deed for mortgaged premises, fol. 12, $3 36. [Fair copy for Master, 84 cts.] Attending for his approval, 50 cts. Engrossing, $1 68. Attending Master on executing, 50 cts. Draft. costs, fol. 15, $4 20. Attendance on taxation, 50 cts. Taxed bill to file and enrol, $1. Copy taxed bill to be paid by Master, $1. Draft affidavit of disbursements, fol. 2, and copy, 84 cts. Draft testatem fi. fa. for residue, fol. 8, $2 24. Engrossing, $1 12.

Counsel: Retainer $5. Perusing, &c. bill, $2 50 Fee on hearing, $2 50. [Motion to confirm report, $1 50. Do for sale, $1 50. Do for costs, $1 50. Do. for distribution, $1 50. Do. to let purchaser in, $1 50.] Motion to deliver up lease, &c. $1 50. Perusing final decree being special, $2 50.

$2 00

5 00

00 84

7 50

CHAP. II.

Brought over.
Taxed off.
$00 6

Clerk: Filing bill, 6 cts. [Do. request or instructions for order, 6 cts.] Draft and entering order that subpœna issue, fol. 2, 74 cts. Sealing subpœna, 12 cts. Filing two affidavits, subpœna, copy notice, [and instructions for order that defendant appear,] five papers, 30 cts. Draft and entering order that defendant appear, fol. 3, $1 11, (*or* entering and copying order, fol. 5, $2 26.) Filing affidavit and instructions for order to take bill as confessed, 12 cts. Certificate 20 cts. Draft and entering order to take bill as confessed, fol. 3, $1 11. Filing notes of issue and setting down cause, 20 cts. Filing taxed costs, certificate and duplicate receipts, 24 cts. Exemplified copy order, fol 7, 87 1-2 cts. Sealing exemplification, 12 1-2. Filing, entering and copy of decree, fol. 18, $2 58 Draft brief statement, fol. 5, at 25 cts. $1 25. Entering same, fol. 5, 60 cts. Draft decree to enrol, fol. —. Engrossing final decree for Vice Chancellor to sign, fol. 18, $2 70. Examining, taking to Vice-Chancellor, and filing, $1 6. Certificate of enrolment, 20 cts. Filing report of sale, receipt, copy costs and receipt, 24 cts. Draft and entering order of confirmation, fol. 2, 74 cts. Filing and entering two mortgages, 50 cts. each, $1. Docketting decree, 20 cts. Four copies of docket for Clerks of Supreme Court, 48 cts. Sealing execution 12 cts. Entering and filing return, 18 cts.

Master A.: Computing amount on two securities, $2, *or* taking account on bond and mortgage, $1. Draft report of amount due, fol 6, and copy, $1 56. Marking and signing four exhibits, 24 cts. Attendance to settle report, $1. Copy report to file, 60 cts.

Master B.: Draft advertisement of sale, and two copies, 90 cts. Commission on sales, ($1850,) $14 25. Signing and acknowledging

Brought over.

Taxed off, $

deed, 75 cts. *Commissioner* taking acknowledgement, 37 1-2 cts. Draft receipt, fol. 3, and copy, 90 cts. Draft report of sale, fol. 8, and copy, $2 8. Attendance to settle report, $1. Copy report to file, 80 cts. *Printers' bills*, $9 20 *each*, $18 40.

Sergeant: Fee on filing bill, 12 1-2 cents. Fee on setting down cause, 50 cents.

Commissioner: Administering five oaths, 62 1-2 cents.

Vice-Chancellor: Taxing costs, $1 50.

Clerk of County: Filing and entering notice of *lis pendens*, 18 3-4 cts.

Clerks of Supreme Court and Register, &c. for searches, or searches in the different offices: For searches, $2 45.

Clerks of Supreme Court: Filing four copies of transcript, 24 cts. Docketing same, 50 cts.

No. 3. *Another, Exhibiting the Fees of the Officers together.*(a)

In Chancery:
Before the Vice Chancellor.

The Merchants Insurance Company, &c.
vs.
Cuyler, &c.

Complainants' costs on filing bill for foreclosure, suit stopped after service of subpœna on one defendant.

Deductions.

$9 80	1	Retainer, sol. — counsel —	$8 00
	2	Drawing bill folio, 63 (43 only) at 28 cents.	17 64

(a) This bill was taxed by the taxing Master of the third circuit. Each item is numbered, not only for the purpose of accompanying the decision of the officer with his remarks in cases of litigated taxation, but to denote the objections made, and exceptions taken in case of an appeal to the Chancellor from such taxation. Some of the points decided upon the taxation

CHAP. II.

Brought over. Deductions.			
$4 62	3	Engrossed copy to file at 14 cts. - -	$8 82
	4	Counsel perusing and signing bill. - - -	2 50
	5	Notice to register to file bill, enter order, and issue subpœna. - -	0 37½
	6	Drawing subpœna fol. 2 and engrossing. - -	0 84
0 56	7	Do. Another. - -	0 84
	8	Register, filing bill, 6 cts. and notice, 6 cts.; entering cause in minutes of causes, fol. 1, 12 cts. Draft and entering order, fol. 1, 37 cts.	
	9		

of this bill will be found in the notes to form No. 1. The following will show the vigilance, which an officer may consider himself bound to exercise, in 'cutting down' the limited fees now allowed for professional services:

see 2 R. S. 651. § 13.

'Item No. 2. . . is over charged, bill counts *but 42 1-2* folio, of this *one* folio in page 2 is description in hæc verba, and one do. in p. 9 and 10 is Ditto. and 11 1-2 do. in p. 7-11. is composed of statements of judgments and another mortgage, all of which are alleged to be subsequent to the complainants'; of these statements, I conceive at least 9 folios are unnecessary—See directions in 13d rule.

On pages 12, 13, 14, I am of opinion, that there are at least 4 or 5 folios of matter which, with reference to the provisions of the 130th rule, and 2 R. S. 653. § 5. cannot properly be allowed; I therefore deduct from draft bill,

Over count, folio, - -	20
Matter in hæc verba, - -	2
From statements of judgments and mortgage, - - -	9
From charging part of bill, &c. in pages 12, 13, 14, - -	4
Folio	35
And I deduct from copy to file folios, - - - -	33

Brought over. Deductions.			
		2 seals, 24 cts. and entering award of process 20 cts. and sergeant's fee, 12	
	10	cts. - - -	$1 17
	11	Attending register on entering order. - -	0 50
$0 14	12	10 Copies to serve at 7 cts. a folio —20. -	1 40
	13	Serving subpœna on one defendant - - -	0 75
	14	Drawing affidavit of service folio. 2, engrossing and oath. - - -	0 96½
0 56	15	Drawing notice of commencement of suit and object fol. 4 (2 only allowed) -	1 12
	16	Engrossing to file with county clerk with description, fol. 4 - - -	0 56
	17	Clerk filing and entering in index. - - -	0 18½
0 28	18	10 Copies to serve upon defendants, fol. 40 at 7 cts.	2 80
0 37	19	Service upon one defendant	0 37½
0 96½	20	Affidavit of service, fol. 2 engrossing and oath. -	0 96½
0 50	21	Draft, costs, $1. Copy, 50 cts. service with notice, 37½ cts. - -	1 87½
	22	Attendanee 50 cts. Taxation $1. - -	1 50
	23	Paid county clerk 15 cts and of supreme court 45 cts. for searches. -	0 60
			53
		Deduct	17 79
$17 79.			$35 21

No. 4. *Costs on Attachment, &c.*

In Chancery:

———, ———. } Complainants' costs.
vs.
———, ——— }

Costs consequent upon the neglect of defendant to comply with order, Nov. 19, 1829.

1829. Dec. 19.	Master drawing, engrossing, and copy, certificate, fol. 5(*a*) - -	$1 75
26	Solicitor do. do. affidavit of E. A. F. fol. 2 and oath, - -	99½
16	Do. do. do. fol. 3, - -	1 43
	Engrossed copy of Masters summons to annex, fol. 4, - -	50
	Certified copy of order of 14 Dec, 1829. to annex, fol. 2, - -	18
18	Drawing, engrossing, and copy. affidavit of E. A. F. fol. 2, and taking,	99½
	Notice of motion for attachment and service -	37½
26	Drawing, engrossing, and copy, affidavit of E. A. F. of service, fol. 2, and oath, - - -	99½
1830. Jan. 5.	Brief on motion for attachment, - -	1 00
Disallowed $1 00	Solicitor's fee on motion $1. Counsel, $2 50 -	3 50
	Register, filing 11 papers, 66 cts. reading 7 others 70, entering in rough minutes, fol. 2, - -	1 60

(*a*) A few of the first items, it will be perceived, are carried out under the old fee bill.

Brought over.

	Solicitor drawing and engrossing order, fol. 5,	2 10
	Attend ing register on entering same, - -	50
	Register, filing draft, and entering and copy of order, fol. 5, - -	1 11
	Do. entering attachment and habeas corpus, -	40
	Solicitor drawing and engrossing attachment, fol. 2,	84
	Do. do. do. habeas corpus, do. 2.	84
	Register sealing do. and attachment, -	24
		20 22

The People of the State of New-York, on the relation of ——— and others, vs. ———, ———. } Relator's costs.

$8 00	Retainer D L. jr. Solicitor, H. B. Counsel, [see note(*a*) to form No. 1]	8 00
March 24.	Defendent brought into court by sheriff, -	
	Brief $1. on motion that defendant answer interrogatories, -	1 00
1 00	*Solicitors* and counsel fee on bringing in defendant, and motion, for order to answer interrogatories, -	3 50
	Register, reading and marking attachment and return of habeas corpus, &c.	40
10 00	Carried forward	$33 12

CHAP. II.

		Brought over.	$33 12
	$10 00	Entering in rough minutes, fol. 2, - - -	00 24
	March 24.	Solicitor drawing and engrossing order, fol 3, -	1 23
		Attending register on entering order, - - -	00 50
		Register filing attachment and return, and entering and copy order, fol. 3. -	00 75
		Counsel perusing and signing interrogatories, - -	2 50
		Drawing, engrossing and copy interrog. fol. 7, - -	3 43
		Copy to serve, notice of filing and service - -	00 86
		Register filing interrogatories	00 6
	March 25	Brief and *Solicitors* and	
	$1 00	Counsellor's fee on coming in of answer and notice for commitment - -	4 50
		Register searching and taking papers to court, and reading eight papers - -	1 17
		Ditto entering in rough minutes, fol. 4, - -	00 48
		Solicitor drawing and engrossing order for commitment of defendant, fol. 11, at 42 cts.	4 62
		Register filing draft, 6 cts; entering and copy order, fol. 11, - - -	2 27
		Solicitor attending Register on entering order,	00 50
		Serving order on Sheriff,	00 25
		Costs to tax 50 cts. to serve, 50 cts. notice and service, 37 cts.	1 37
		Master taxing costs, 50 cts.	00 50
		Solicitor drawing and engrossing mittimus, fol. 6, -	2 52

$		$
	Register entering and sealing same, - - -	00 32
	Solicitor drawing and engrossing affidavit of disbursements, fol. 2; and taking —	00 96½
$11 00		62 19

	Sheriffs fees;	
	Serving attachment,(a) -	00 50
19 50	Mileage from New-York to Albany, 150 miles, at 19 cents, and returning -	57 00
4 75	Expenses bringing prisoner from New-York to Albany,	4 75
1 50	Expenses in Albany, -	4 50
	Attending court there days at $1. - - - - -	3 00
	Serving Habeas Corpus, and bringing up prisoner thereon, - - - - -	1 50
4 75	Expenses from Albany to New-York, - - -	4 75
$41 50		138 19
	Deduct	41 50
		96 69

Costs taxed at $96 69,

J. R., Taxing Master.

(a) Sheriff is entitled to same fee as a constable, 2 R. S 648, last paragraph, and 647, § 40 On bringing up prisoner sheriff is entitled to 12 1 2 cents a mile each way, but nothing for his own expenses. (2 R. S. 640. § 38. paragraph 22.) If prisoner is unable to pay his own travelling expenses, Sheriff is to be allowed them. See 7 Cow 424. 3 Wend. 430. ib. on appeal. He must return process of contempt to the court. Snelling v. Watrous, August 1830. See *post* § 84, No. 5, n.

CHAP. II.

No. 5. *Costs on Special Motion for payment of a Tax out of a Fund in Court.*

In Chancery:

Before the Chancellor.

R. M.
v.
S. F. L., G. C. and S. his wife, &c. and the United States.

Costs on application of G. C. (one of defendants,) for payment of a certain tax and assessment out of a fund in court.

Taxed off, $3 00

Solicitor: [Retaining fee, $3 00. See note (*a*) to form No. 1.] Draft affidavit of S. F. L., fol. 12, —. Fair copy, —. Engrossing same, fol. 12, —. Draft affidavit of G. C. fol. 3, —. Engrossing, —. Fair copy, — Copies of above affidavit for District Attorney,(*a*) fol. 15, —. Copies of other papers annexed to affidavit, fol. 5, — Notice of motion, 37 1-2 cts. Copy notice to swear to, fol 2, —. Affidavit service, fol. 2, and copy, —. Five notices of motion for the other parties, $1 87 1-2. Admission of service by the other parties, fol. 2, and copy, —. Affidavit as to signature of R. to admission of service, &c. fol. 3, and copy, —. Affidavit as to signature of P. S., fol. 2, —. Consent that defendant C., be paid balance in court, fol. 2, and copy, —. Engrossing, fol. 2, —. Agreement with District Attorney to refer, fol. 8, and copy, — Engrossing, fol. 8, — Draft order

(*a*) District Attorney of U. States, the United States having appeared by the District Attorney, who claimed on the ground of priority, the whole surplus in favor of their debt against D. R. L. who had mortgaged the property, and who died insolvent, indebted to United States, and whose heirs were parties. The applicant on the motion had a second mortgage, and to save the property had paid the tax, and now claimed it out of the fund. The United States opposed it as a voluntary payment, and claimed the whole.

Brought over.

Taxed off. CHAP. II.

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	inde, fol. 4, and engrossing, —. Attending Register on entering order, 50 cts. Serving order on Master, 25 cts Draft subpœna ad testificandum, fol. 3, and copy, —. [Draft pre-
00 37½	cipe for subpœna, fol 1, and copy, 37 1-2 cts.] Draft ticket, fol. 3, and copy, —. One copy to serve, —. Serving, 12 1 2 cts.
	Two litigated attendances before Master,
2 00	$2. [Brief for counsel before Master, $2] Attending Master to hear his report read, 50 cts. Do. for his report, 50 cts. (*Motion noticed on Master's report at — term, —*) Notice motion to District Attorney, 37 1-2. Copy to swear to, fol 2, —. Affidavit service, fol. 2, and copy, —. (*Motion noticed for — term*, 1830) Copy Master's report for District Attorney, fol. 23, $1 61. Notice of motion on Master's report, 37 1-2 cents. Copy notice to swear to, fol. 2, 14 cents. Affidavit service, fol. 2, and copy, 84 cents. Attending Chancellor on presenting Master's report, $1. [Do on motion for con-
1 00	firmation, $1. Do. on motion for payment of
1 00	tax and assessment, $1.] Attending him on motion for costs, $1. Draft and engrossing orders inde, fol. 5, $2 10. Attending Register on entering orders, 50 cts. Draft costs, fol. 8. $2 24. Copy to serve and notice taxation, $1. Copy to file, $1. Attendance on taxation, 50 cents.
5 00	*Counsel:* [Retaining fee, $5] Attending two litigated references before Master, $5. Motion to confirm report, $1 50. [Do for pay-
1 50	ment of tax and assessment, $1 50] Motion for costs, $1 50.
	Master: Attendance litigated, $3. Administering oath, 12 1-2 cts. Draft report, fol 23, and 2 copies, $7 36. Marking seven exhibits, 42 cts. Attendance to settle report, $3. Copy report to file, $2 7.

CHAP. II.

Brought over.
Taxed off,

$

Assistant-Register: Filing agreement with District Attorney, and order, 20 cts. Entering and copy order, inde, fol. 4, 84 cts. Sealing subpœna, 12 1-2 cts. Filing Master's report and two exhibits, 18 cts Filing notice motion, affidavit and order, 18 cts. Entering and copy order, fol. 5, $1 5. Exemplification of order, fol. 7, 87 1-2 cents. Sealing exemplification, 12 1-2 cts. Filing costs, certificate, and duplicate receipts, 24 cts.

Commissioner: Administering seven oaths, 87 1-2 cts.

Vice-Chancellor: Taxing costs, 50 cts.

Taxed, including officers' bills, at ——, New-York, June 25, 1830. Duplicates.(*c*) O. E.

No. 6. *Another, on application by petition for payment of Tax.*

[Title, &c.] In such case the additional charges for petition would precede the affidavits in support of, as charged in the last form. The following items have been taxed in another application of a similar description. [Solicitor and counsel retaining fee, $8. But see note (*a*) to form No. 1.] Dr. petition, folio —, fair copy for counsel —, engrossing to file, —, oath, 12 1-2. 4 copies of petition and oath and notice ditto, —. Notice of motion and service. 4 defendants, —. Dr. affidavit service, fol. 4, engrossing and oath, —. Dr. certificate of collector and engrossing to file, —. Brief on presenting petition, —. Solicitor and counsel fee, —. Dr. order, folio 5, —. Copy to file, —. Attending inde. —. Attending reference to ascertain amount due for taxes, —. Copy costs, to file, —. Do. 4 defendants and notice taxation, —. Attendance on taxing, —. Master taxing, —.

Clerk's bill:—Filing petition, 2 affidavits, notice, and certificate, — Filing copy order, —. Entering fol. —. Filing copy costs and report of taxation, —.

) One to file.

No. 7. *Costs of opposing Motion, founded on a Petition.* CHAP. II.

[Title]

In the matter of the Petition of E. J., concerning a suit at law by the receivers of the Bank of Niagara. } Motion denied with costs of receivers of opposing motion.

Taxed off.		
	Retaining fee for Solicitor and counsel, [see note(*a*)to form No. 1. - -	$8 00
	Draft affidavit of P. B. fol. 12, at 28 cts. -	3 31
	Engrossing same to file, at 14 cts. - -	1 68
00 84	Copy affidavit for counsel,(*d*)	00 84
	Commissioner taking affidavit	00 12½
	Register filing same 6 cts. Dr. affidavit of W. W. fol. 9, at 28 cts. - -	2 52
	Engrossing - -	1 26
00 63	Copy for counsel -	00 63
	Commissioner taking -	00 12½
	Register filing -	00 6
00 70	Copy petition, fol. 10 -	00 70
	Counsel arguing motion	2 50
1 50	Solicitor attending on opposing motion argued -	1 50
	Drawing brief for counsel	1 00
	Solicitor attending Register on entering order that motion be denied -	00 50
	Dr. order denying motion, fol. 2 - -	00 56
	Register entering order	00 24
	Certified copy same -	00 19
	Copy bill of costs, 50 cts. notice taxation, 37 1-2 cts. -	00 87½

(*d*) The charges for copies of affidavits and of petition for counsel and of Solicitor for attending to oppose the motion, are disallowed, for the reason that the services do not appear to have been actually or necessarily rendered; the copy petition served, was sent to the counsel, and the original affidavits were also sent instead of copies. Per J. Rhoades, taxing master.

CHAP. II.

Taxed off,		Brought over.	£
	$	Master taxing same -	00 50
		Solicitor attending on taxation	00 50
		Disbursements, postage	3 00
		Draft affidavit of disbursements, fol. 1, copy and taking - - -	00 54
	11 67		$31 15

§ 82. Vol. 1. p 81-3. No. 1. Taxing Master's Report.* No. 2. Order denying complainant's petition for re-taxation, and directing a re-taxation as to certain items in defendants notice of appeal No. 3. Order on motion for re-taxation by consent, (the objectionable items not having been pointed out to the Master) and for stay of execution. No. 4. Order on petition,

The taxed bills, under the present law, are to be annexed and constitute part of the enrolment. They must be therefore carefully engrossed, without erasures or interlineations, like other papers filed in the cause, and if not, or if any considerable deductions are allowed on taxation, they must be redrawn at the expense of the Solicitors offering them for taxation, before the taxing officer certifies thereon the amount at which they are taxed (*c*) It has been held, that on the taxation the party objecting to any part of any pleading or proceeding as unnecessary, or improper, must point out specifically to the Vice-Chancellor, or Master, the objectionable matter, in default whereof the Master, &c. is not required to notice the objection, and the court will not order a re-taxation on appeal. (*d*) By the revised statutes, the taxing officer is required to examine bills and reject items not taxable, whether objected to or not. (*e*) But although this court will not, as a matter of course, allow an appeal from the decision of the taxing officer, where a party has neglected to appear or to make the objection before him, yet, where a taxation is ordered, if it appears on the face of the taxed bill that other

(*c*) 2 Paige, 53.
(*d*) Kernochan v. Williams et al. 1 Dec. 1829. Rhoades for the motion, J. King, contra. Motion refused with costs.
(*e*) See 2 R. S. 653, § 5, ib. 183. § 101. R. 130; see also old rule, 60. 2 Paige 50.

* *Taxing Officers*, appointed by an order of Jan. 1830,

Circuit 1.	Thos. Addis Emmet,	*New-York.*
2.	James G. Clinton,	*Newburgh.*
3.	Julius Rhoades,	*Albany.*
4.	Wm L. F. Warren,	*Saratoga Springs.*
5.	Chester Hayden,	*Rome.*
6.	Charles Humphrey,	*Ithica.*
7.	Richard L. Smith,	*Auburn.*
8.	Ethan B. Allen,	*Batavia.*

improper items were allowed, the taxing officer may be directed to review his taxation as to those items, although not objected to on the previous taxation.(*f*)

specifying the items to be re-taxed. No. 5 Order on motion affirming the Master's taxation, and directing an additional allowance.

No. 1. *Master's Report on Taxation.*

In Chancery.

R. D. A., D. S. and I. F. R. }
v.
J. W. P., and J. H. }

State of New-York, ss.:

I, —— the taxing Master in Chancery, for the —— circuit of the State of New-York, residing in the city of N. Y., do report that I have this day taxed the costs of the complainants in the above cause, including officers, bills, at the sum of —— dollars —— cents.

Dated New-York, Jan. ——, 1830. (Signed.)

No. 2. *Order for retaxation of certain Items.*

[Caption, &c. § 32. p. 78. C. P. and S. S. P. v. J. D. Perine v. Dunn. See 3 J. Ch. 508.] A motion having been made by Mr. Wallis, Solicitor and of counsel for the defendant, on appeal from the taxation of the defendant's costs, for a re-taxation of the bill of costs in this cause on the part of the defendant, and the said motion being opposed by Mr. Riggs, Solicitor, and of counsel for the complainants, and the objectionable items being debated by the counsel on each side, and a motion having been made at the same time by Mr. Riggs, by and on behalf of the complainants, founded upon a petition of C. P. one of the complainants, for a re-taxation of the said bill of costs in respect to other items which were specified in the said petition, and the same being opposed by Mr. Wallis, on behalf of the defendant, and the objectionable items contained in the said petition being also debated by the said counsel, and due deliberation had: It is ordered, that the motion founded on the petition of the complainant, C. P., be denied; and all the items of costs specified in the said petition are declared to be rightfully taxed: and it is further declared, that the following items of costs contained in the notice of appeal on the part of the defendant, and known and designated in the notice of

(*f*) 2 Paige 51.

CHAP. II.

appeal, and also in the bill taxed by the Master, by numbers 4. 20. 27 59. 62. 68. 77. 78. 79. 80. 83. 86. 87. 88. 102. 103. 109. 112. 120. were not rightfully taxed, inasmuch as the disallowance or deductions in respect to the same and specified in the said notice, ought not to have been made; And it is thereupon ordered, that the said bill of costs be retaxed, to the end that the said deductions may be withdrawn, and that the charge, No. 27, be subject to the same deduction of 25 folio from the answer, as was made in respect to other charges in relation thereto. And it is further ordered, that the Master, on such re-taxation, allow to the Solicitor for the defendant his costs for resisting the petition and motion on the part of the complainant for a re-taxation.

No. 3. *Order for Re-taxation by consent.*

[Caption, &c. p. 78. Hill v. Stroud.] A motion having this day been made by Mr. Hopkins, the Solicitor for the complainant, for a retaxation of costs, and the same being opposed by Mr. Spencer, Solicitor for the defendants, and inasmuch as the objectionable items were not pointed out in any objections made on a regular taxation before a Master, and the Solicitor for the defendants offers to have the bill re-taxed, according to the usual course of the court: It is thereupon ordered, that the Solicitor for the defendants cause the bills of costs in this case to be re-taxed before one of the taxing Masters, on the usual notice to be given by him to the Solicitor for the plaintiff, and subject to the right of appeal by either party, and that the proceedings on the execution issued in the above cause be further stayed until after such taxation.

No. 4. *Order for Re-taxation, specifying the Items.*

[Caption, &c. p. 78. Burnet v. Adams admx. &c.: Before the late Circuit Judge (the present Chancellor,) of the 4th circuit. Dec. 22. 1826.] On reading and filing the petition of Judiah Ellsworth, Solicitor in behalf of the several persons who were, by the order of the ninth of October last, permitted to come in and prove their demands before [the Master] on payment of costs, for a re-taxation of the said costs, and counsel

having been heard thereon, on the thirtieth day of October last, it is this day ordered and decreed, that the said costs be re-taxed at the expense of the defendant, J. A. and that the Master, on such re-taxation, reject the charges for 'Attending Clerk to have order entered,' and the charge for 'Drawing affidavit of notice of taxation, &c.' and that he also disallow the charge for 'Clerk attending with papers on the request of defendant,' unless it shall be made satisfactorily to appear to the said Master, by the certificate of the Clerk, that he actually attended with papers which were on the files or records of this court; and that in case such certificate is given, the Master allow for such certificate.

No. 5. *Order Affirming Master's Taxation.*

[Caption, &c. p. 78. Wallis v. Blake.] On reading, &c. a notice of a motion for a re-taxation of the complainant's costs in this suit, which were taxed by F. A. Esq. taxing master in the city of N. Y. and the affidavit of the complainant to the said notice annexed, and also an affidavit of the due service of said notice, and of a copy of the affidavit thereto annexed, and on motion of the complainant in person, the same being opposed by Mr. W. A. Duer, in behalf of Mr. B. Robinson, Solicitor for defendant, and due consideration had thereon: It is ordered that the Master's taxation be, and the same is hereby affirmed, with the addition of $13 for counsel and Solicitor's attendance at hearing.

In addition to the points noticed in the first vol. [p. 83.] it may be added, that where the suit is compromised, as between parties or between complainant and one of the defendants on his agreeing to pay costs, and this *with the consent of the Solicitor*, it has been held that he cannot after proceed in the suit with a view to recover those costs.(a)

Solicitor and client, lien, remedy for costs, &c. Vol. 1. p. 82-83.

(a) 13 Price (Exch.) 173.

CHAP. II. § 83.

ENROLMENT AND EXECUTION.

Vol. I. p 83-5. Enrolment-docket and transcript. As to exemplifications, see p. 33.

The 111th rule of court, (cited vol. 1. p. 84) requiring an enrolment, before a deed can be given to the purchaser, does not apply to a sale under an interlocutory order; in such case the deed may be executed before enrolment. But if the decree is final as to the whole subject matter of the sale, it must be enrolled before any conveyance be executed; although as to other branches of the suit, another decree might be necessary before the cause is finally disposed of by the court; and if the bill is dismissed with costs as to one defendant, the decree must be enrolled before any execution issues: and the enrolment of any subsequent decree between other parties, or as to other matters, must be made by a continuance on the record of the first enrolment (*b*) The provision of the revised statutes [also cited, vol. 1. p. 84.] requiring, in the making up of the enrolement, 'After the expiration of thirty days,' &c. the 'bill, pleadings, *and papers*, filed in the cause' to be attached, &c. has been amended The 'bill, pleadings, and *such other* papers filed in the cause, *as the Chancellor shall from time to time, by general rules direct*,' must now be attached, together with the taxed costs and engrossed copy of decree, &c. as before required, and 'together with a brief statement or abstract, to be prepared in such form as the Chancellor shall direct, and in no case to exceed five folios, of the proceedings from time to time had in the cause'.(*c*) Previously to this amendment, the following additional rules of court had been adopted, viz.:—

Party applying for enrolment to see that papers and bills of costs are furnished.

When a final decree is entered in a cause, if all the pleadings and other papers, which by law are to be annexed to the enrolment thereof, are not in the office where the decree is entered, it shall be the duty of the party upon whose request the decree is enrolled, to apply at the proper office or offices, and have such pleadings and papers transmitted to the office of the register, assistant register, or clerk, where such decree is to be enrolled; it shall also be his duty to see that the necessary taxed bills of costs are furnished, to be annexed to the decree on enrolment.(*d*) The several

Officers to transmit papers for enrolment.

(*b*) Minthorn's Executors v Executors of Tompkins, 2 Paige 102.
(*c*) Act of Apl. 20. 1830 § 32. Sess. 53. p. 393.)
(*d*) R. 181. March 3d, 1830.

officers with whom any such pleadings or papers are filed or deposited, on the application of a party or his Solicitor, or upon the written request of the Register, Assistant Register, or Clerk, with whom the final decree is entered, shall transmit all such pleadings and papers to the office where the decree is to be enrolled, at the expense of the party requesting such enrolment.(*e*) Where the final decree awards costs to any or all of the parties, to be paid out of the proceeds of a sale or otherwise, any party who wants an enrolment may give notice to any other party entitled to costs under the decree, to file a taxed bill of such costs with the Register, Assistant Register, or Clerk, with whom such decree is entered, within fifteen days, or that the decree will be enrolled without such taxed bill.(*f*) If the party on whom such notice is served, neglects to file his taxed bill of costs within the time prescribed, the party giving such notice, on filing an affidavit of due service thereof, may have the decree enrolled without annexing thereto the taxed bill of the party who has thus neglected to file the same.(*g*) Where such taxed bill is received at any time before the actual enrolment of the decree, it shall be considered as in time, and shall be annexed to the enrolment as required by law. But if any party neglects to file his taxed bill of costs in the office where the final decree is entered, until after such decree has been regularly enrolled, he shall forfeit his right to costs under the decree.(*h*)

Proceedings to compel parties to furnish taxed bills of costs.

If party neglects to file taxed bill, decree may be enrolled without it.

Party neglecting to furnish bill of his costs, to lose same.

Subsequently to the amendment above recited, in relation to the enrolment of decrees, the Chancellor adopted the following additional rules, viz.:

Papers to be annexed to enrolled decree.

The papers which must be attached together and annexed to the final decree on enrolment, are the original bill, or petition, and all other pleadings in the cause, including exceptions to pleadings, reports thereon, and exceptions to such reports, petitions to revive, or in relation to any change of parties, or in any way affecting the merits of the cause; and all reports affecting the merits or which are necessary to explain the decree, together with the original taxed bills of costs of such of the parties as are entitled to costs under the decree.(*i*)

(*e*) R. 182. ib.
(*f*) R. 183 ib.
(*g*) R. 184. ib.
(*h*) R. 185. ib.
(*i*) R. 186. April 23, 1830.

CHAP. II.

Statement or abstract of proceedings.

The statement or abstract of the proceedings shall state as concisely as practicable, the time of filing the original bill, the defendants who appeared and answered, and those who appeared and suffered the bill to be taken as confessed against them, and the defendants against whom the same was taken as confessed for want of appearance; distinguishing those who neglected to appear after a personal service of process, from those who were proceeded against as absentees. It shall also show the changes of parties which have occurred during the progress of the cause, and the manner in which the new parties were brought before the court or made parties to the suit, so far as the same can be ascertained from the minutes of the court and the papers on file; and such other proceedings in the cause shall be recited therein as may be necessary to a correct understanding of the decree.(*j*)

Officers to furnish necessary information.

It shall be the duty of the several officers of this court, upon the written request of the Register, Assistant Register, or Clerk, with whom the final decree is entered, to transmit to him any information contained in the records of their respective offices which may be necessary to enable him to prepare the *statement* or abstract in the manner directed in the preceding *rule*.(*k*)

With regard to docketing decrees and sending transcripts, the revised statutes [further cited *ante* vol. 1 p. 84] have been further amended, and the docket must contain the statement before required of the names, at length, of all the parties to such decree, designating particularly those against whom it is rendered, their residence, title, trade, or profession, 'if any such be stated in the *bill or petition* on which the decree is founded.'(*l*) The transcript is to be sent to each Clerk of the Supreme Court,(*m*) and this provision, of course, includes the Clerk at Canandaigua, as well as the Clerks in Utica, Albany, and New-York.

(*j*) R. 187. April 23, 1830.
(*k*) R. 188. ib.
(*l*) Act to amend, &c. Apl. 20, 1830. (Sess. 53, p. 393.)
(*m*) Ib.

§ 84.

Vol. 1. p. 85-7. Execution and process to enforce performance of decretal orders and decrees.

No. 1. order for fi. fa. for the complainant against one of the defendants for arrearages of rent.

No. 2. Do. in favor of one defendant against another.

No. 3. Order that sheriff proceed to sell under a fieri facias, or show cause why attachment should not issue.

No. 4. Order to return execution or show cause why attachment, &c.

No. 5. Order for attachment in that case. Proceedings thereupon.

The forms of process of execution, particularly those approved by the court, are referred to in the first vol. [p. 85-87.] It may be here remarked, that the supposed instance [vol. 1. p. 87.] of a mortgagor's not being ordered by the decree to surrender possession, would seldom occur; as the ordinary form of such decree, directs that the purchaser be let into possession; and by the rule of court this is to be done on production of the Master's deed, and a certified copy of the order confirming the report of sale when made absolute. [vol. 1. p. 218.] In case of refusal the forms of proceeding, to be resorted to, are given under their proper head, of foreclosure. [*post* ch. 7. § 24.]

No. 1. *Order that Fi. Fa. issue against one Defendant for the arrears of rent paid by Complainant to another Defendant.*

[Caption, &c. p. 78. Hunt v. Door, et. al.] On motion of J. V. H. solicitor for complainant: It is ordered, that a fi. fa. issue to the sheriff of the city and county of Albany, in favor of the complainant against goods and chattels, lands and tenements of the defendant S. D. under the decree entered in this cause on the 16th day of Nov. last for the sum of $155 64. with interest from the 31st day of July last towards the arrearages of rent paid by the complainant to the defendant P. S. V. R. And it is further ordered that a fieri facias issue to the sheriff of the city and county of Albany, in favor of the complainant against the goods, chattels, lands, and tenements of the defendants, representatives of W. F. deceased, for the sum of $993 62 with interest thereon from the 31st day of July last towards such arrearages aforesaid.

No. 2. *Another in favor of one of Defendants*

[Caption, &c. p 78. Hunt vs Door and others.] On motion of Mr. J. V. H. on behalf of P. S. V. R. one of the defendants in this cause: It is ordered that a fieri facias issue to the sheriff of the city and county of Albany, in favor of the said P. S. V. R. against the goods and chattels, lands and tenements of the defendant S. D. under the decree entered in this cause on the 16th day of November last, for the sum of $29 13 with interest

CHAP. II.

from the 31st day of July last, for part of the arrears of rent reported to be due and unpaid to the said P. S. V. R.

No. 3. *Order that Sheriff Proceed to Sell under fi. fa. or Show Cause why Attachment should not issue.*

[Caption, &c. p. 78. Scribner vs. Hickok and Hickok, administrators, &c. see 4 J. Ch. 530. § 85. No. 1.] On motion of Mr. J. V. H. of counsel for H. H.: It is ordered that H. H. late sheriff of the county of Saratoga, do forthwith proceed to sell the goods and chattels, lands and tenements seized by him under an execution in the above cause to him directed and delivered: or show cause at the next term of this court to be held at the City Hall, of the city of New-York, on the fourth Monday of May next, at the opening of the court on that day, or as soon thereafter as counsel can be heard why an attachment should not issue against him.

J V. H.

No. 4. *Order to Return a Ca. Sa. or Show Cause why Attachment should not issue.*

[Caption, title and commencement, p 78. Handy ads. Abbot.] It is ordered by the Chancellor that —— sheriff of O return the ca. sa. to him directed and delivered in this cause in 20 days after service of notice of this rule, and in default thereof show cause on the —— next after the said default before the Chancellor at the capitol in the city of —— at ten o'clock in the forenoon why an attachment should not issue against him(*b*)

No. 5. *Order Nisi for Attachment against Sheriff for not returning an Execution.*

[Caption, &c. p. 78. Mason and others v. Kain and others.] An order having been made in this cause and entered with the Register on the nineteenth day of January in the year one thousand eight hundred and eighteen that C. B. sheriff of the county of Ulster to return the execution in this cause to him directed and delivered on or before this day, with his certificate of what has been

(*b*) See note to next form.

done therewith, or show cause before the Chancellor at his chambers on this day at ten of the clock in the forenoon why he had not done so, and that the said sheriff pay the costs of that application, or then and there show cause to the contrary, and it now appearing to the Chancellor that the said order has been duly served on the said Sheriff according to the directions in that respect therein contained. And the said Sheriff not having returned the said execution, nor paid the said costs, nor shown any cause why he has not done so—Whereupon, and on motion of Mr. Riggs for the complainants: It is ordered that the said sheriff return the said execution with his certificate of what has been done thereon, in eight days after service of a copy of this order on him personally, or by leaving the same at his dwelling house, or place of transacting his official business, or that an attachment issue against him for his contempt, to be directed to, and executed by any one of the coroners of the said county: And it is further ordered that the said Sheriff pay to the complainants or their solicitor the costs of the former application and order, and of this application, and order, to be taxed, and that the complainants have execution for the same, to be directed to, and executed by any one of the coroners of the said county.(*a*)

(*a*) The above form is given to show what the practice has been. The order may now be varied, so that an attachment issue forthwith, and without any special application to the court for this purpose (see 2 R. S. 536. § 6.) This however must be upon affidavit of service of the preceding order to return the writ, and a certificate of the register, &c. that no execution has been returned and filed in his office; or an affidavit of search and no return. [See the form of affidavit in supreme court. Tidd's Forms, by Caines, p. 164.] But the above form may still be useful as the ground work of enforcing payment of costs against the sheriff. As to the officer to whom the attachment is to be directed, and in what manner the sheriff is to be held in custody, &c. See 2 R. S. 441-2. As to the manner of proceeding on bringing him up, and as to the form of order of commitment for contempt, see 2 R. S. 357-8. 2 Paige 103. As to precept to commit, see rules of court p. 92. 2 R. S. 535.) The sheriff is also liable to a civil suit for damages for not returning process, 2 R. S. 440. If the process be an *attachment* delivered to him, he must return it to the court, by the *return day* (as to which see R 26. 2 R. S. 555. § 31.) *without any previous order*, and in default an attachment may be issued against him of course on being allowed by the court on proof of the default in the manner directed by 2 R. S. 537. § 17. 18. &c. see also

CHAP. II.

§ 8

Vol. 1 p. 87. Nulla bona, or, final satisfaction; contribution; cancelling decree, &c

No. 1. Order vacating order to stay execution issued in name of complainant for the benefit of one of defendants who had paid the decree directing that unless the other defendant bring into court the contributive portion, the same be levied and collected, without prejudice to a Bill for further contribution.

No. 2. Certificate of satisfaction of a mortgage, pursuant to the directions of a decree.

No. 1. *Order to enforce Contribution, &c.*

[Caption, &c. p. 78. Scribner v. Hickok and Hickok, administrators, &c. and Boardman and others, 4. J. Ch. 530. See § 84, No. 3.] A motion having been made on the part of the defendant, Horatio Hickock, that the order of this court of the 20th of April, 1813, staying proceedings on the execution issued in the name of this complainant, but at the instance of the defendant Horatio Hickock, and levied on the property of the defendant, Daniel Boardman, might be vacated, and the said motion being debated as well by Mr. A. Van Vechten, of counsel for the defendant, Daniel Boardman, as by Mr. J. V. Henry, on behalf of the said Horatio Hickock, and the petition and documents acccompanying the said motion, and the affidavits produced and read against the said motion being duly considered, and inasmuch as the decree, &c. [See the residue of this order in 4 Johns. Ch. 532-4.

The form of a satisfaction of a *Decree* may be drawn from those in common use, observing the directions of the Statute. [2 R. S. 182-3 § 98-100.] The following is a special satisfaction of a *Mortgage* pursuant to the direction of a Decree. [See this Decree p 86. and the Case, Smith, &c. v. Carl, &c. p. 297. 303.]

No. 2. *Certificate of satisfaction of a Mortgage, pursuant to the Direction of a Decree.*

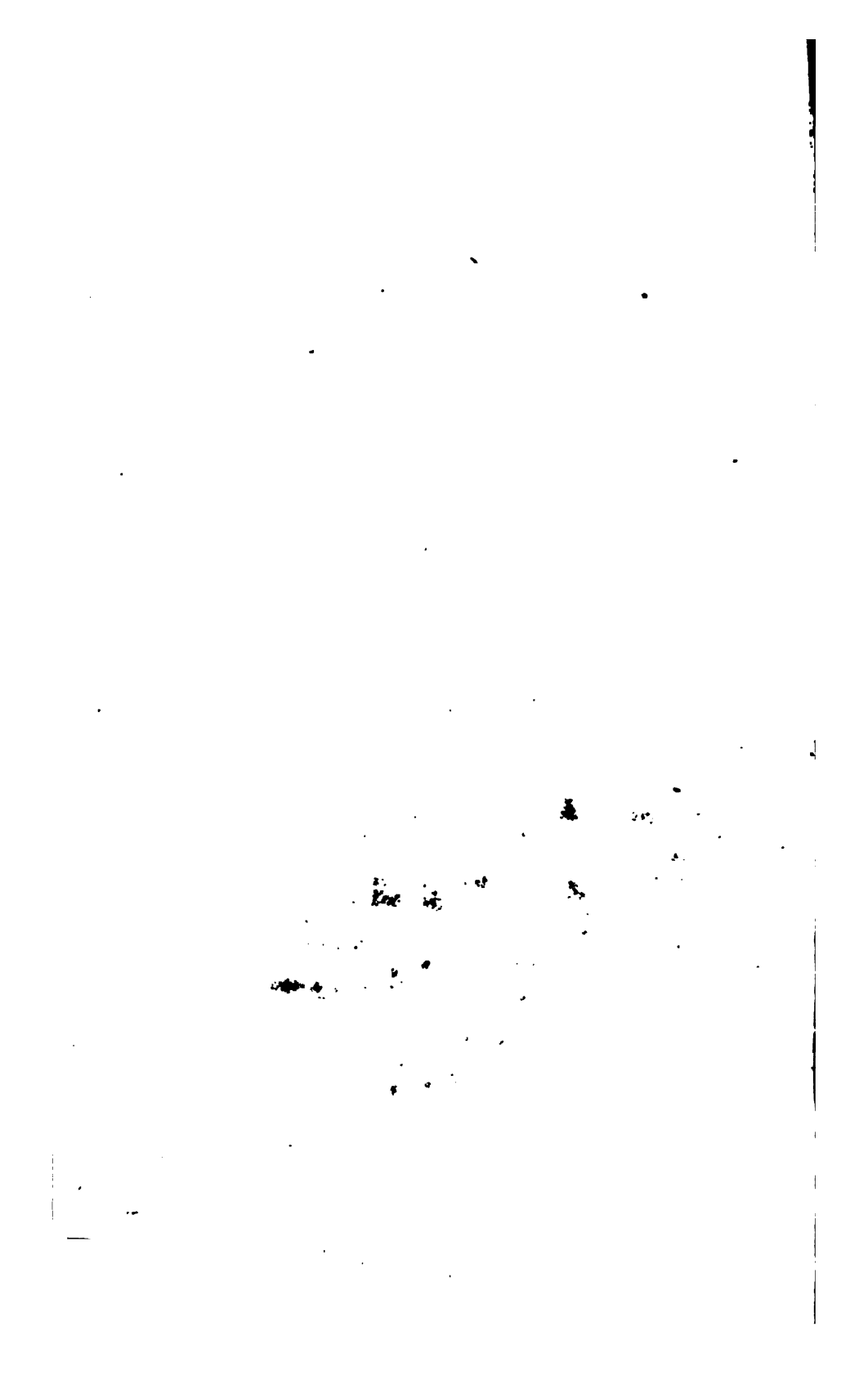
In obedience to, and in part performance of a decretal order of the Court of Chancery, in and for the State of New-York, bearing date the 29th day of December, in

rules of court No. 2. 'attachment' p. 84-5. and as to endorsements thereon, 2 R. S. 536-7. § 11. 13. 15. R. 22. As to test and return of process, see R 19. 2 R. S 178. § 65. *ante* vol. 1. p. 194. It is the duty of the sheriff to return process of contempt *to the court*, not to the clerk's, or register's office. Snelling v. Watrous, 6 Aug. 1830. On motion for pluries attachment, *alias* having been returned to the Assistant Register's office, and a certified copy produced by Solicitor (J. Rhoades) on motion.

the year of our Lord 1829. between C. B, W. B., and M. H., complainants, and I. C., B. R., S. K., and J. C., defendants: We, the said I. C., B. R., S. K., and J. C., the said defendants, do hereby severally certify, that a certain indenture of mortgage bearing date the 14th day of April, in the year of our Lord 1818, executed by T. H. to us the said I. C., B. R., and S. K., to secure the payment of the sum of nine thousand seven hundred and fifty dollars, and registered in liber —— of mortgages, page ——, in the office of the Clerk of the county of Suffolk, on the —— day of April, 1818 is satisfied to the end that in obedience to the said decretal order, satisfaction of the said mortgage may be entered of record.

Dated this —— day of January, 1831.

Witnesses present.



INDEX.

Abatement; see 236; On sales 127; deficiency of assets 147.
Abbreviated statement, case, 51. for hearing 47, 48.
Abode, service 37, 38. 56.; interrogatories 166.
Absence, from office 39. 55-56, for years, evidence 166.
Absentees, order 73, 74.
Abstract 139, 140. of the case 51. or facts of the case for hearing on motions 47.; of decree in Master's office 104. of proceedings on enrolment 458. 460. of title 135-6. 246. n.
Account, accounting: Dr. and Cr. 202-4. 105. 111-114. 166. 194. n. of assets 50.; rents 125. in executorial suit 103-5. 109-14. 166.; *accounting parties* 111-113. interrogatories and examination 157-201.; bringing in accounts 104, 105 111-113. 202-4.; report on 231.; account by way of discharge after sale 144.; order for accounts 90 and n.; *Account books* 166.; partnership accounts 166.
Acknowledgment 166.
Actions at law, directed 266.
Address in petitions or bills 20, 21. 44.
Adjournment, hearing, &c. 45-47. 58, 59. 69. 315. 365.; by Master 102. of examination 196. n. sale 130. n.; costs of 62.
Administration of assets under a will 103. 104. &c. 109. &c. 166.; administration entries 166.; Administrator ib.; description of 28, see executor, &c.
Admission, practice 12.; by consent in lieu of proof 77, 78.; of service 58. 436. n. costs; retracting 77. n.
Adultery 263. 272-4. 277. 280-1. n.; new trial 290.
Advance, sale 142-4.
Advantage of irregularities 68.
Adverse possession, ev. 166.
Advertisement, partnership 166. for creditors to come in 103. 104. 108. of sale 128. 129. 131.
Affidavits, 24-31. 33-35. 81. 166-7. briefed 48.; how compelled 45.; counter 63. 69; demand of costs 65. 664. disbursements, &c. 439. and n.; exceptions to 59; of execution of power 65.; filing 69.; *before Master*, when ev. 101. in support of state of facts, &c. 118. or charges, claims and state of facts 205-6. 210. 212-215. 225; of merits 70; on motion 41, or opposing same 45; open-

The index to the first volume might serve occasionally for reference to chapters and sections, which in the present volume are arranged according to the analysis of the former.

ing default 70. in reply to those in answer 69; to petition, bill &c. 23; on production, 153 n. 154; scandalous or impertinent 59. & n.; *of service*: 54-58. of copy of certified copy of order 55. 88. and demand of costs 65. or of decretal order on clerk or agent 89. or personal service of decree 89. of demand and non-payment 63. 65. of *notice* 55. for feigned issue 269. rehearing 304. object of suit 436. n. of petition, &c. 47. 54. of subpœna ad. test. 198. summons 98. 99.; signature to admission 436. n.; of solicitor verifying petition 301.; for special jury of merchants on feigned issue 285. supplemental, &c. 63. 69.; of sureties 343. and 172d rule of court.

Affirmance, by court of errors 384-5. 387. and that it be entered nunc pro tunc 388. in part and reversal in part 388. remittitur and order thereon 395-6. and bill of costs 391-4.; by supreme court of U. S. with costs 423-4.; of taxation on appeal 457.

Affirmation 34. 35. 24. 29. 167.

Affixing, service 39. 56. 57. 99. of summons 97. 99.

Age, affidavit, proof of 30. 31. 24. interrog. 167.

Agent, service on 37. 38. 39. 57. of decretal order 89. demand of costs 66.; affidavit by 28.; death of and notice 39.; agent party 46. when not chargeable with interest or costs 326.; *agent, agency, authority*, 167.

Agreement, inter. & ev. 167. by consent 75-78.; among complainants as to conducting a suit 76.; without prejudice 75.; made a rule of court 19. 20. n.; to arbitrate 19.; non-performance 91. 92.

Allegations, in affidavits 27.

Allowance 167. form &c. of deed by Master 138. 146. on accounting 113. 114. 203. n.

Ambiguity 167.

Amendment of affidavit 33. 34.; bill 74. before reference 90. n.; charge 202. n. 215.; costs of 436.; of course 87. n.; motion for, brief 49. 50.; of order 74. 84. 17. 18.; of petition 18. 21. *n.* 46.

Amicable suits, &c. 44. costs 123. 124.

Ancestors, interrog. 167.

Ancient deeds, wills, &c. 167.

Annual rests 203. n.

Annuity 167. report 203. n.

Answer and answering, affidavits, &c. 45. 46. 58. 59.; to bills 167. injunction bill, impertinence 100.; interrogatories, contempt 63.; order to 73.; petition of appeal various forms 366-9.; answer and plea 311.; out of the state 35. 75.; answer and examination of party 183. n. 187-201. 167. *objecting* to answer 183. n.; *jurat to do.* 183. n.; jurat to answer or bill 35.

Appeal 323-428. 148. from order refusing a rehearing 304.; appealed motion 60. 72.; from taxing officer 454-7.; common pleas 325-7. surrogates 327-338. circuit judges 338-341. vice chancellors 341-348. 9-12. court of errors 348-397. supreme court of U. S. 397-428.

Appearance 68. 69.; no waiver 60.; order for 73.

Apportionment, costs 74. 236. 319.; among creditors 220-4. and of costs, and report 236.; of costs, decree 319.

Approval, form and execution, by Master 137-8. of sureties 343.

Arbitration or reference to referees 19. 256-262.

Argument: notice 369. stipulation 370.; supreme court of U. S.

419-422.; affirmance for not arguing, court of errors 384-5.
Arrears, of rent, fi. fa. 461-2.
Article of sale or purchase 130. articles of co-partnership 167.
Assessment of damages, issue 267-8. n. for non-performance 91. or expenses of party wall 93.
Assets 111. deficiency 147. distribution, &c. bill for, Masters office 103. &c.
Assignments 167. assigning *guardian ad litem* 22.
Assistant register, see register, &c.
Attachment, costs 61. n. 62. 63-67. bill of costs 446-9.; order for 73. 186-7. 462-3.; precept in nature of 139. 140.; for non-production or examination 153. n. 183. 185.; against sheriff 462-3.
Attendance, on motions 60. 61. 68. 182. of witnesses 182. 197.
Attestation 33. to mark or signature 29. 23. n 34.
Attorn, notice motion 58.
Attorney 167.
Attorney General 19.
Auctioneer and sales 130. 167.
Authentication of documents 33.
Authority see agent, solicitor.
Award, &c. 19, 256-262.
Bail, ev. 167.
Balance on accounting 145. n. of accounts 203. n.; of partnership 167.
Bank 84. 167. 168.
Bankrupt and bankruptcy, petitions, &c. 17. 21. n. 24. 25. 46. partner, fraud 167.
Baptism 30. 31. 167.
Belief, swearing to 29.
Best evidence 165. 167.
Biddings, bidders, 129. 130-1. opened 142-4.
Bill and Petition: General routine of proceedings applicable to both 17 to 465. see analysis. Bill for administration of assets under will, proceedings before Master 103. 104. &c. 109. &c.; amendment 74.; before whom presented or where filed 44. 45.; of cost, forms 430. &c.; of costs and enrolment 458-460.; formal objections by demurrer 41. n.; jurat 35.; taken out of the state 35.; order for copy 74.; particulars of claim before Master 206.; bill and plea, decree on 210.; bill of review 389.
Birth, registry, &c. 167.
Bond, and bond debt 167. creditor's charge, affidavit by creditor before Master 212. 207-8. 214.; on appeal, common pleas 326. surrogates 329-30. circuit judges 328. 340. vice chancellors 342. as stay of proceedings 343. to court of errors 348. n. or on error to sup. court of U. S. 414. affidavit of sureties and approval 343. and rule of court 172.
Books of accounts 167. and papers, &c. production 91. 152.
Boundaries 168-9.
Brief 47-54. short brief 41. for petition or motion 48.
Brother, next of kin 168.
Burial 168.
Calender in sup. court of U. S. 420.
Captain 168.
Caption, of depositions 196. n. caption and title to orders 78. in court of errors 359.
Carrying in claims, Masters office 93. 94.
Ca. Sa. 461-4.
Case, abstract, motion, 47.; brief 48. 61.; cases and points in court of errors 370-384.; to court of law 263-6.; in petitions or bills 20. 21.
Cashier 168.
Cause 430-1. n.; cause petition 17. 36.
Certificates 168. 31-33. 24. to affidavits, &c. abroad 35. of Chancellor to attestation 33.; of clerkship 15

14. and classical studies 13.; for commission by Master 107.; of counsel rehearing 301.; deposit or bond filed 350.; of judges on case 265. or on issue, or action directed 266. n. 268. n.; of marriage 24. 30. 31.; of master 250-1. 148-152. 153. n. 155. 183. n. 225. 230. of sufficiency or insufficiency of examination 107. 108. 183. n. 199. n. as to form, &c. of deed 138. 146.; of officers of court 32. register, assistant register or clerk 25. 32. and n. 30. upon admission to practice 14.; of satisfaction of mortgage pursuant to a decree 464-5. *certified copies* 25. 32. 33. 168. of order, service 87. 88.

Chancellor 9-12. may prolong masters powers 95.; when party, &c. orders by Vice Chancellors 85.; certificate to exemplification 33.

Character protected by the court 24. 25. impeached 168. 169. see impeachment.

Charges and claims 118-122. 168. 222-225. 100. of subsequent interest 147.; charges and discharges 202. n. 101. 111.

Children and issue, identity, &c. 168.

Church records, ev. 30. 31.

Circuit court of U. S. removal and appeal 399-401. judges, appeal to Chancellor 338-341. surrogates decree, to the court of errors 356. case thereon 382.; roll, feigned issue 283. circuits of Vice Chancellors 43. 44.

Circumstances 168.

Citation on error to sup. court of U. S. 412-14.

Claims and charges 202-222. in Master's office 93. 94. under decree 118-122. of creditors 118-119-122. 103. &c. 108. &c. 111, &c. legacy 215-16. or mortgagee in possession 146-7.

Clerical misnomer 32. n.

Clerks 168. (see Register, Assistant Register, and Clerks) certificate out of the state 36.; clerk or student, clerkship 12. 13. signing solicitors name 43. Service by or on 39. 99. on 55 and n. 58. of copy decretal order 88. affidavit by 28. and n.; of demand of costs 66.

Closing proofs 41. n. order 74.

Co-debtors, obligors, ev. 168.

Collateral 21. n. motions 19. petitions 17.

Commencement, affidavits 27. orders 79.; suits, demand before 429. and agreements or consents respecting 76. 77.

Committee, certificate of appointment 32. prosecuting 22. application by for appointment of agent 70. n.; costs 87.

Commission to take answer out of the state 75. *testimony abroad* 26.; certificate of Master 148. 149.; to examine parties or witnesses 148-152. 164. form 149. n. defendants 106. 107. 112.; order 74. by consent 75-76. to examine parties or witnesses 148. n. 149.; of lunacy, habitual drunkard, issue [illegible] discharged 291.; to take wife's waiver of equity 256. 263.

Commitment, contempt, service 88. for non-payment of costs or money 66-7. or non-performance of order—See bill, costs 446-9.

Common (see motions) motions 41. jurat 34. orders 73. 41. service 87.; Com. pleas, appeal 325-7. return 75. 76. tenant 168.

Comparison of hands 168.

Compelling—purchase, possession, &c. 138-140.

Compensation for deficiency on sales 127-8.

Competency, see credit.

Compromise 19. bill costs 443.
Comptroller's certificates, &c. 168.
Computation—of amount due, report 231. n.; distance 37.; interest 203. n.; time 60. 46. n. of service 52. 97.
Concessions 168.
Conclusive ev. 168.
Condition of sales 127-8. 130. Conditional order 62. testimony 168.
Confessed, confessions 168. taking petition, &c. as confessed 69. see pro confesso.
Confidential 168-9.
Confirmation, of report 246. 247-251-2. 227-8. of sales 132. 134. separate report 123. 227. &c. order 74.
Conscientious scruples 24.
Consents between parties, solicitors, strangers, orders, and agreements by, 75-78. 49. 155. of all parties 19. without prejudice 75.; consent brief 49.; to arbitrate or refer 19. 256-262.; confirm report absolute 247-9.; to suppress depositions and withdraw exceptions to report 255.; for re-taxation 456.; in court of error 385. as to filing petition, &c. 3. dismissal after filing 364.
Consideration 169.
Consignee 145. n.
Consolidation—of matters 60. on motions 41. in one order 93. of suits with view to proceedings in Master's office 93. 94.; of separate appeals 389. 390.
Contempt 18. attachment, commitment 62-63. 169. (See precept, attachment); non-payment of costs 62-7. non-attendance before Master 183; service 87, 88. & n.
Contingent legacy, state of facts and claim 215-216.
Contract—non-performance, order 91.
Contribution, expenses of party wall 93.; in favor of one defendant who paid the execution 464.
Conveyance 169. 146. by lunatic 85.; by parties, refered as to form, &c. 137-8.; on sale 132.; questions of 141-2.
Co-partner and partnership 169.
Copies 169. and copying 23.; of affidavits 48 36.; bill, order for 74.; of proceedings certified 23. 25. 32. evidence 30. 31. n. 165.; of order or ordering part for Master 94. of petition, &c. for court with points and authorities 47, 45. 36. 433.; of register of baptism, or marriage 30. and n.; *copy-right* 266. n. *copies taxable* 432. n.
Corporations 169.
Costs—bills of costs and taxation 428-430-458.; costs of motion when costs in cause 60-7.; costs in cause 60. divided into costs up to hearing and subsequent costs 123.; apportionment of costs 74. among creditors, report 236.; amendment 74.; appeal from decree for costs 342. n. out of assets 336.; affirmance, by court of errors, bill of costs 391-4.; attorney and client 24.; bond for on appeal 329.; countermand 43. n.; demand, tender, &c. 62-63.; default 70. decrees on questions of costs 319. 320. and interest 320. against one defendant 319., discontinuance 68.; dismissal 60.; feigned issue 292-3. filing bills, enrolment 458-460; not filing petition of appeal court of error 362.; irregularity, court of error 360.; interlocutory 60-7.; lien 82; motions 60-7.; notice motion 42.; former notice 43. n.; opposing motion 60.; payment of 146.; of petition standing over 45.; of purchaser 142-4.;

ting aside lunatics deed 87.; of separate reports 123-5.; costs reserved 38. 47. 85. 92.; rehearing 306-310.; costs damages, &c. on reversal, &c. supreme court of U. S. 423-4. 425.; sales for 125; for scandal impertinence, &c. 24-26.; separate report 123-5.; solicitor liable 25. for slovenly papers 34.; solicitor and client 24. 25.; against sheriff not returning execution 462-3.

Covenant order for assessment 91. 92.

Counsel, counsellor, admission, oath 12-16.; brief 48 in extenso 51.; certificate for rehearing 301.; consenting 44.; consultations 49.; on hearing 44. in Masters office 115. 127. 136. 193.; on motions 41.; suggestion 41; signature 23. n.

Counter—affidavits 63. 69. 70. n.

Countermand 69. of notice 43.

Course, motions of 41. orders of 73.

Court 9-12. acting on its own motion 59. n. 24. 25. *court of errors*, appeal, &c. 348-397.

Credit, competency, &c. 169.

Creditors claims brought into Masters office by way of charge 202-225. 118-120-2. 146. 203-4. 208. 96.; remedy where [illegible] neglect 109. 207. n. mortgagee in possession 118-20. 146-7.; creditors suit 207. n. 103. 104.; interrogatories and examination of creditors, &c. 120-3. 169.

Cross, appeal 346. 386. 332. bills 45. cause 261-2. examination 196. and n. 197. interrogatories 169. witnesses 163-4. 169. motions 23. n. 45. petitions 45.

Cruel treatment 274.

Curing irregularity, see waiver, appearance.

Customs 169.

Date 170. orders 81. mistake 33.

Damages, non-performance, assessment 91.

Days, for motions and petitions 43. notice 42. no fraction 60.

Death 170. of agent 39. party, order entered back 93.

Debtor and creditor 170. Dr. and Cr. account 202-4. 105. 111-114. 125. 144. *Debts* 170. sales for 125. debts and legacies separate report 114.

Declarations or admissions 170. or affirmation 24. 29. 34. 35.

Declaratory order 80. See orders and decrees.

Decrees 74. 170. See orders and decrees.

De die in diem 102. 114.

Dedimus potestatem 75. See commission.

Deeds 170. 146. decree setting aside lunatic's, 86.; feigned issue 270.; by parties, *reference* as to form, &c. 137-8.; *production* of 152-7; on sales 132. 141-2. to purchaser 132. 133. n.

Default (see pro confesso) 72. to appear 60. at hearing 51-2. 72.; in not answering petition of appeal 360-2.; in examination 183. n.; non-production &c. 153. n.; non-payment of interest, and decree for sale and to cover future defaults 316.; setting aside or opening 62-63. 68. 70. 71. 85. offering to stipulate without applying to court, no costs 61.; costs 70. 125. orders 73. 74.

Defective title 170.

Deficiency of assets 147.

Delay 95. 100. 71.

Delivery deed, &c. 170. up to cancel, decree 86.

Demand, before suit 429.; of costs 62-66.; and refusal, service of decree 89.

Demurrer 41. n.; of witnesses 195. n.

order over-ruling, 74.
Denying, with costs 60-3. petition 82.
Deposit on appeal court of errors 350. 397. rehearing 302. n. 304. n. 307. n. 309. of deeds in court 19. documents with Master 100. on sales 130-1. 134. 142-4.
Depositions 170. abroad or out of the state 26. 82. of witnesses 196. n.; in former cause 101; consent to suppress 255.
Description (see boundaries) 170. of parties 27. n. 28.
Devise, devisees 170. issue 267. n. 271. or special case on, 264.
Dilatoriness, see vigilence, delay, diligence.
Diligence 59. n. 87. 95. diligent prosecution, see bond on appeal 329. 340. inquiry 170.
Directions in decree, pursuing them 94. 103-4. further directions 109. 230.
Directory, ev. 170.
Disbursements, costs 434-6. n.
Discharge, discharging, 144. commission lunacy 291, insolvents 171; orders, &c. 296-5. 17. 41. 42. n. 70, to dismiss 60. ex parte 38. for feigned issue 275. for irregularity 68. of reference 100. of purchaser 140-1.
Disclaimer 171.
Discontinuance 19. 68. bill costs 443. order by consent 76.
Discovery, costs 429.
Discrediting testimony 24. see credit, impeachment.
Dismissal, of appeal 354. cross appeal and that it be entered nunc pro tunc 386. with costs for want of prosecution but without prejudice, court of errors 365. without costs court of errors 364. of decrees and orders, for not filing appeal court of error 363-4. or after filing 364. or of part of appeal 364; of order for reversal on rehearing 310. of petitions or motions 60. 61. 84; after reference to referees 261-2; as to one and reference as to others 73; voluntary 68. 76; without prejudice 60. 74. 365. of writ of error, sup. court of U. S. 419. &c.
Dissolution of partnership 171. injunction 84.
Distance, service 37.
Distribution, &c. suit for, Master's office 103. &c.
Divorce 171. see orders, feigned issue 272-4. costs 428.
Docket 458-460.
Documentary ev. 171. 30. 31. n. 31-33.
Draft, orders, decrees, or minutes of 73. 40. 48.
Due diligence 37. 95. notice 52. service 88. n.
Dwelling house, see abode, service.
Election, of one of two charges in bill divorce 274. to redeem 90-91.
Emergency, service 37.
Engrossing 23. affidavits 33. what taxable 432. n.
Enlarging time, order 74; publication or closing proofs 41. n.; award 259; performance 171.
Enrolment, docket, and transcript and execution 458-460-5. 148. of petition 17-18.
Entitling 20. 21. affidavits 27. causes 27.
Entries 171. entry of orders 81.
Equity reserved 92. 145-6. 230. 268. n. 292.
Erasures 85. 171.
Evidence 164-171-183. 122; by affidavit or interrogatories 122; in accounts, on taking same 113. 114. for rents 125; of birth, age, identity 30. 31; before Master 101. 82; on motions, how compelled 45. 176; as to trial at law 26; written admissions 77. 78.
Examination of accounting party,

parties generally, creditors, or as witnesses 105-8. 113-114. 120-1. 195. interrogatories, &c. 157-164. examination 183. n. 183-201.; clause in decree 91 : or order 74.; certificate, commission, &c. for parties or witnesses 148-152. examination and testimony 183-201. of witnesses 121-3. order for, 74.
Examiner's fees, order 83.
Exceptions : to proceedings before Master, 199-201. ; to examination for impertinence, scandal, or insufficiency 107. or to his certificate of the sufficiency or insufficiency 108. ; to reports 246. 247-256. 47. 145. by creditor 121. on title 137. ; decree 317. 353. n. 74. or to report on exceptions to answer order, appeal, case 353 and n. 372. ; or to report of referees 256. n. 257. 259. ; to petition, bill, affidavit, and other proceedings for scandal or impertinence 26. 24. 25. 59. ; orders and decrees on exceptions 74. 317. 353. n.
Excuse, default, 51. 53.
Execution 461-4. against executors 145. n ; of deed, bond, will, &c. 170. 270.
Executors 171. or administrators accounts, surrogates, appeal 33[illegible] 3. 336. 339. n. executors, trustees and guardians to account 90. ; description 28. ; executorial suit 103. &c. 109. &c. 111. &c. accounting in form of Dr. and Cr. 202-4. 103-7. &c. as trustee and executor 125. interrogatories 158. n. 159. 164-183-201. 171. examination 187-191. 171. ; to pay balance 145. n. ; report 231. ; executors as creditors 101.
Exemplification, and exemplified copies 25. 32. 33. 171.
Exhibits 171.
Ex parte, declarations, &c. 171. affidavits 30-31. applications 13. motions or petitions 17. 23. 36. 37. 44. 51. 52. ; orders, nisi 38. absolute 38. for attachment 185-7. ; proceedings before Master 98. 102. 113. 125. 127. ; costs 62. 63.
Expenses 171.
Expunging scandalous matter, &c. 24. 25. 59. n.
Extracts 171. affidavit 30. 31.
Fact or law, how ascertained and settled in chancery 256-293.
False suggestions 41.
Family, service on 37. 38. 56-7.
Fees of officers of the court, see costs 428-458. of examiner, order 83.
Feigned issue 267-293. 145. ; on motions 45.
Fi. fa. 461-4.
Filing papers, petitions, bills, &c. 247. 44. 45. affidavits 69. report 246-7.
Fine 171.
Finding old deeds, &c. 171.
Fire, loss, purchaser, 134.
Folio, superfluous, costs 444. n.
Foreclosure, sale 129. 132. 133. n. and report 231. n. bills of costs 440-5. 450.
Foreign testimony, language, affidavit depositions, jurat, certificate, laws, &c. 26. 35. 171-2. Foreignor 171.
Formal objections, to petitions, bills 41. n. 45. 60. in limine 51. 52.
Former costs 43. n. motion 61. 62.
Fraud, fraudulent 172.
Freehold estates of testator 172.
Freightage 172.
Fresh interrogatories 108.
Funds in court, payment, investment, &c. 23. 24. 30. 57-8. 123-4. 146-8. 450-3.
Funeral expenses 172.

Further—charge 202. n. 215; account by way of discharge after sale 144; directions, bringing on cause for, or decree on, and costs 46. 109. 125. 145-6. 230-1; examination 108. 183. n. 199. n; time, affidavit 58.
General report and proceedings thereon 145-8. 230-256. 106. 109. 111. 114. 123. 125. *General reputation* 172.
Goods 172.
Grand-father 172.
Grants 172.
Grave questions 19.
Guardian ad litem 22, 74; general guardian, appointment, removal, surrogate, appeal 333. 336. n.; guardian and maintenance, and separate report 114-118. 123. 224-6. 226-8. 251; order to account 90.
Habeas corpus, motion 19. contempt 63.
Habitual drunkard 268. 271. appeal from com. pleas 325.
Hand writing 172. affidavit 65.
Hearing 9-12. 69. preparatory, or intermediate proceedings from service to hearing 39-69; notice 345-6. before Vice Chancellors 9-12. 72. 85; petitions, motions, ib. and 45; adjournment 45-7. or standing over 17-18. default 51, 72; ex parte 44; hearing orders and decrees 69-90; costs up to 123-5. on further directions and costs 125; in sup. court of U. S. 419-422.
Hearsay 172. 165.
Honor 172.
Husband and wife 172. see wife.
Identity of persons or parties entitled 172-3. 267. n. 271. 23. 24. affidavit 30. 31.
Idiot 173.
Illegitimacy 173.
Illiterate persons, affidavits, bills sworn to, signature, &c. 29. 34.
Impertinence 21. n. 25. n. affidavits, 24. 25. motions 41. exceptions 59. and n. before Master 199-201.
Impeachment of testimony or witnesses 173. 24. 69. see credit, character, witness.
Inclosure 173. see boundaries.
Incompetency of witness 173.
Incumbrances 173.
Indictment, perjury, affidavit 26. 27. n.
Indorsment—on deed 173. bills petitions, and other papers 23. 21. n.
Infants, guardian and maintenance, and separate report 114-18. 123. 224-6-8. 251; funds invested 147-8 application on arriving at age 147-8. 30. 81.; order 73; prosecuting 21.
Information and belief in affidavits 29. and n.
Injunction 37. prayed for 22; against bank, order dismissing petition 84; motion, costs 60; perpetual decreed 292; order dissolving 308. reversal thereof on appeal 346. n. 347.
Inquiry after witness 173.
Insanity 173.
Inscriptions on tomb stones 173.
Insolvent debtors 173.
Instalments, decree, foreclosure, to cover future defaults 316.
Instanter, costs, payment, demand 62. 63.
Instructions 173. brief 48. 49.
Insufficiency of examination, exceptions 107. 199-201.
Interest, of witness 173-4; of party, verifying it 23. 24.; interest on mortgage, order 316; decree respecting 320. on setting aside deed for lunacy 87; on accounting 111. 112. 203. n.; subsequent 145. n. 147.; purchaser 134.

Interlineations 33. 174.
Interlocutory costs 67. 60-7.
Intermediate proceedings from service to hearing 39-69.
Interpreter 26. 164.
Interrogatories 173. before Master for examination of accounting party, party generally, or as witness 105-8. 110. 112. 157-164-183. 200-1. interrog. and evidence 164-183. 101; parties 110. 120-1. creditors 120. witnesses 120-1; on attachment for contempt 183. n. 63.
Intestacy, intestate's estate 173.
Intoxication 173. costs 428.
Introductory part of petitions, bills, 20. 21. affidavits 27.
Inventory 173.
Investment of funds 147-8. see funds in court
Irrelevant matter, irrelevancy 24. 41. 59. n.
Irregularity (see waiver) service 60; order setting aside for 84. 70 or discharging orders for 68. 38. 41. 42. n; in court of errors 360. quashing appeal 365.
Issue, proof secundum allegata 173. 165. note of 305; issue at law directed 267-293. 26.
Items, in accounting 113. 114. 111.
Joint case, court of errors 380. 382. charges 202. n. 208. Joint and several affidavit or affirmation 24. 29. 30. jurat to, 34; joint and several decree 74.
Judges' certificate, out of the state 35. 36. to special case, or action at law directed, see certificate.
Judgment, creditor's charge, affidavit 212.
Judgment and decrees 174.
Judicial proceedings 174.
Jurat to petition, bill or answer 35. 20. 22.; jurats 34-6.; erasure or mistake in 33. 34; to be copied 36.; to affidavit 34. 27; costs 432. n.; to answer and examination 183. n.
Jurisdiction 9-12. 60.
Knowledge or acquaintance with parties or persons 174.
Lapse and length of time 174-5. 71.
Latent ambiguity 175.
Law and fact, questions of, how settled in Chancery 256-293; laws of the state 175; foreign laws 175; law partner, service 56. 98.
Lease 175. leasehold; sales 125. 128. lessee 145. n.
Legacies, legatees 175. 50. 145. n. and creditors 109; charge 215-16. claims 93. 94. 121. in Masters office 96; sales for 125; separate report of 114.
Legal effect 175.
Letters 175; of attorney, demand of costs 62-64; testamentary, of administration, &c. 175.
Length of time 175.
Lex mercatoria 175.
License to practice 16.
Lien of solicitor 457.
Limitation 175.
Limited partnership 175.
Lis pendens, costs 484. n.
Litigation 28.
Living or not 175.
Local improvements 23.
Locality, location 175.
Loss, lost or destroyed 175. by fire 134.
Lunatic, lunacy 175. 291. title of suit 21. n. setting aside conveyance 85; committee, agent 70. n; reference 101. n; habitual drunkenness 268. 274.
Maintenance & guardian & separate report, & increase of maintenance 114-18. 123, 224-6-8.
Management of estate 175.
Mandate of sup. court of U. S. to court of errors 424.

Manner of living, interrog. 175.
Manor, custom, boundaries 175.
Map 175.
Mark, signature 29, 34.
Marriage, ev., certificate, settlement, &c. 175, 24, 30, 31, issue respecting 267 n. 271.
Master's office: Proceedings in 94 &c. See 'reference' 'order' and other particular heads in the index. Order or ordering part for master 94; what masters to act 95; expediting proceedings 95; summons and service 96-100; speeding reference after summons 100; return of summons and further proceedings 100, leaving documents, state of facts, &c 100; (see state of facts;) regulation by master of future proceedings 100-103; master entitled to counsel or professional aid 136, 193 & n. Routine of business in the master's office 103, &c.: proceedings ex parte 102-3—vol. 1 p. 43; advertisement for creditors—publication of order to bring in their claims 103-4; summons for defendants to bring in their accounts 104; accounts in form of Dr. and Cr. 105, 111-113, 202; see account; interrogatories for insufficiency of accounts 108, 112, 157-164; excepting to 107; state of facts 106; (see state of facts;) examination and compelling process, interrogatories &c. 157-9 &c.; (see accounting parties, interrogatories, examination;) certificate for and commission to examine at a distance, (see certificate &c.,) 32, 106, 112, 148 152; production or inspection of books, papers, &c. 107, 110, 111, 152-7: see production &c.; examination brought in 107, 112, 183, &c. 187-9 &c.; exceptions to for impertinence or insufficiency 107, & to master's certificate of sufficiency or insufficiency of examination 107, 108; (see exceptions, impertinence, &c.;) compulsive process for further examination 108: fresh interrogatories 108: further examination and modes of accounting 108, 111, 112-114, 183, &c., 202, &c.; (see examination, interrogatories, parties,,) proceeding de die in diem 114; (see de die, &c.;) second or peremptory advertisement for creditors 108; their remedy in case they neglect to bring in their claims 108-10; separate reports of debts, legacies, guardianship, and maintenance, state of facts, proposals, and proceedings prior to such report 114-19, 123, 224-8; (see guardian &c., state of facts &c., and report;) creditors' claims brought in by way of charge, and proceedings thereon 119-122, 202 &c., 205, &c.; examining creditors as parties; (see charges, claims, creditors, &c.;) evidence and examination of witnesses before master or commissioner &c. 122, 157 &c., 163 &c., 166 &c. 183 &c.; (see examination, parties, witnesses,;) costs on separate reports or up to hearing 123, &c.; sales before master, (see sales &c.,) 125-132; report of purchase, paying in purchase money, possession, title, reference and report on title, exceptions &c. re-sale or compelling purchase, opening biddings, conveyance &c. 132-144, 175; (see each of these heads in the index;) further account by way of discharge after sale 144; general report, subsequent proceedings on further directions &c., (see report, orders, and decrees, directions &c.,) 145-8, 220, 230 &c. 240 &c. 241 &c. 247 &c.; see objections, exceptions, confirmation.

Materiality of matter in affidavits &c. 24, 25; see exceptions, impertinence.
Memorandums, mem. or note in writing 175-6, 130-1.
Mercantile usage or terms 176.
Merchants, jurors, issue 285.
Merits 41, 42, 45, 47. 53, 70, 71.
Minutes of orders or decrees 73, 72 40, 48.
Misnomer, clerical 32 n.
Mistake 176, in affidavit 33, in minutes, on appeal court of E. 384, in notice 42 n., orders &c. 293-5, payment by 83.
Modes of ascertaining fact and settling questions of law by references, arbitration, examinations, cross bill, action at law, special case, feigned issue, reference and issue &c. 256-293.
Money 176, commitment for non-payment 63, 67 & n.; in or out of court 17, 23, 24, 30, 81, 123-4, 133-5, 146, legacy, charge 215-16.
Monied corporations 176.
Month 46 n.
Mortgage and mortgagee 176, claims 121, debt in stating accounts 90, delivering up to be cancelled, decree 86, hearing 11, minutes and decree or order 72, 73, in possession 146-7, 183 n., 203, sale 129, 130, 132, satisfied 464-5.
Motions 17-19, 41-73, 176, *adjournment* 45-7, *affidavits* 23, 27 n., 33, 34, *appeal*, appealed motion 60 & n., 72, *brief* 43-54, *costs* 60-7, bill of costs for opposing 453, of *course*, non-payment of costs 18, 62-63, for *costs* of former motion 43, motion *days* 43, 44, *default* setting aside, no costs if effected without motion 70, *denied* with costs 71, 72, 85, *discharge* of irregular order 68, *dismissal* 60, *hearing* 69, *notice* 42, 39, 40, *opening* biddings 59, decree 71, 72, *orders* on 84, 85, 79, 80; *money* out of court 30-32, for *payment* of tax, bill costs 450-3; motion *paper* 41, 49, *reference*, ev. 101, reference of 10-12, *renewed*, former costs 61, *settling* deed 138, *special* 17-19, 10-12, *service* 37, motion *supplemental* answer 61, *transfer* of stock 57-8.
Multifariousness, in motions, petitons, 41, 60.
Mutual admissions 77.
Name 175.
Narr, feigned issue 277, 267, 268 n.
Newly discovered ev. 61 n.
New trial, feigned issue 26 n., 288-293.
Next friend 21, next of kin, claim 121, master's office 96, 176.
Nisi causa orders 37, 38, 55, 74, 132, 462, for attachment 183 n., 185.
Non-attendance on motions 60, 61, 68, before master 183.
Non-payment, costs 62-67.
Non-residents, order 73, 74.
Notary 26, 35, 176.
Note, note of hand 176, *see* memorandum.
Note of issue 305.
Notice 176, 42 n., 52; to *amend* 87 n.; *appeal*—notice or statement on—in com. pl. 325, surrogates 328, 341, circuit judges 333, 340, notices of appeal vice-chr's 341, 343 n. from decree (various forms) to court of errors 348-50, from specified parts of decree 349; not to appear 69; *argument* 369; *award* a rule of court 258; of *common* order 87, 88; with *copy charge* 202 n., 215; of *countermand* 43; *death* of agent 39; *discharge* order 68; to *file* bill, enter order and issue subpœna, costs, 433; of *hearing* out of its turn 45, on appeal vice-chr. 345-6, on eqnity reserved after issue at law 268 n.; of *motion* 42, 43, 41, 81, 18, 19, for attachment, non-production &c. 153 n., 154, brief 48,

default to set aside 70, duration of notice 46, for feigned issue 269, saving benefit of first notice 58, 59, service 37; *orders* notice indorsed to serve 88; of *object* and *commencement* of suit, costs 434 n.; with *objections* to report 221 n., 245, of withdrawal of objections 245; of *presenting petition* and of *motion* thereon 39, 40, 52, rehearing 301; of order to file *petition appeal* or be precluded, court of errors 362, notice with copy petition and order to answer, court of errors 360; to *refer* causes to vice-chrs 11; of *rehearing* 304; *renewal* of 46; of sale 128-9; *service*, agent 39, affi. of service 55; *supplemental* answer 61; to *transfer* stock 57-8.

Nunc pro tunc, decree 386, 388, dismissal by consent 363.

Oath 176. 24. administering 34. n. by unauthorised persons 26. to bill petition or answer 35 and n; on examination 183. n. of witness 195. n; of office 12. 15.

Objections—to answer 199. n; to creditors claim and state of facts 220; in limine to motion or petition 60. or form of petition 45; to Masters report and settling same 231. n. 240-7. 251. on title 136. 137.

Occupiers of lands 179.

Offer of money 176. of costs to open default, and to stipulate 61. n. 62. 70.

Office and officer 176. office copies translated 27. certified or official certificates 176. 30. 32; hours 12. service 39; official certificates 30. 32. documents 23. or papers 176. Officers 176. of court 9-16. duty as to enrolment 458-460.

Opening—biddings 130-1. 133. 142-4; or setting aside orders, or decrees on terms 62-3. 293-5. by default, on motion 70 and n. and brief opposing the motion 51.

Opposing motion 41. 45. 51. brief 51. costs 70. 453.

Oral examination 183. n. 193. 199. n.

Orders and decrees: 42. n. 90. n. 69-74-78-87-93. 170. 176.

A. Absolute 132. 247-9. 186-7; *account*, reference to state 90 decretal order on rehearing, varying the principles in taking accounts 312; *action* at law directed 266. n; for *adjournment* 46. 47. see 315. 365. *administration*, decree reversing surrogate's order, directing administration to be granted to appellant and awarding costs out of assets 336; administration of assets under will, decree in suit for, as to maintenance and guardianship 115. 116; *admission*, retracting 77. n; to practice 15; *adultery* 268. n. 272-4. 290. see feigned issue, new trial; *affirmance* (see confirming) for not arguing, court of error 384-5. decree in that court 387-8. and that it be entered nunc pro tunc 388. affirmance in part and reversal in part 388-9. affirmance with costs in sup. court of U. S. 423; affirmance, remittitur, court of error 395-6; affirmance of Masters taxation 457; *agreement*, specific performance 91. see damages; a rule of court 19. 20. n; *amendment* 46 and n.; *annulling* former decree of dismissal, &c. decree final on rehearing 313; to *answer* petition of appeal 359. decree for not 360 answer and plea good in part 311, *appeal*—dismissal (see dismissal) of 364-5; by consent 364 in part 364; for not arguing, see affirmance 384-5; *arrears* of interest and to cover future defaults, order for sale, &c. 316; *arbitrator*, reference to 257 and n.; *assessment* of moiety,

of expenses for taking down party wall 93.; *assets*, see administration of &c. 115. 116; *attachment* for non-attendance before Master, for examination, production of books, &c. order nisi and absolute 183. n. 185. 186-7. 153. n. or against sheriff for not selling, or returning execution 462-3. *award*—enlarging time 259; *B. bank*, dissolving injunction, dismissing petition 84; *bills*, order limited to the prayer 42. n. 90. n. bill and plea, decretal order on rehearing, confirming former order in part 310; bill of review, clause in decree of court of error, allowing review in court of Chancery 389; books, see production.

C. Calendar, entering cause on, court of error 369; cause, see nisi; claims under decree 118-22; *clerical* mistake 32. n; *clerkship* 13. 14; *co-defendants*, decree among 74 and n; *commission* abroad 75. commission of lunacy, order refusing to discharge 291; *commitment*. contempt 183. n. nonpayment 67. order for and costs 63. see precept, attachment; *common* or special 41; *conditional* or on terms 62. 132 for rehearing 302; *confessed*, taking issue at law as 276. see default, pro confesso; *confirmation* of report, order nisi 247. n. 249. 132. in parts not excepted to 247. n. 250. absolute by consent 247-9. 132; *confirming* orders on rehearing, in part, on bill and plea 3[illegible]. with costs and rejecting ex parte proof since the hearing 306. or after additional proof 307 and n [illegible] or on exceptions to report 317. or motion to dissolve injunction 308; *consent*, orders by 75-6. 363-4; *contribution*, (see fi. fa.) reference to assess moiety, party wall 93. enforced by execution 464. *conveyance*, by lunatic, setting aside 85; *copy* of order or ordering part for Master 94; *correcting* defect 17. 293-5. *costs* 61. n. 63. decrees on questions of 319-320. retaxation 455-7. or cost and interest 320. or lien 82. on further directions 123. on discovery, no sufficient demand being made before suit brought 429. on commitment 68. 446-9. affirmance 423. or confirming on rehearing 306-8 reversal, costs out of assets 336. or dismissal of appeal 364; *creditors* to appear 104; of *course* 73; *in court of errors* 359-366. after answer to petition and before or after argument 385-9. and after appeal to *sup. court of U. S.* 426; in sup. court of U. S. 419-424; *cross cause*, dismissal 261-2.; *cross appeal*, dismissal 386.

D. Damages for non-performance, order to ascertain 91; *death* of appellant, remanding cause to bring in parties 386.; *declaratory* as to Solicitors' lien 82. examiners' fees 83. or intent of former order or decree 316. 322.; *default* 69. reversal by 360. costs on decree by default 440-3. default at hearing 51. denying motion to set aside 71. 72. setting aside default 70. 71. 360; *defendants*, decree between 74 and n.; *defect* in order, remedying 17; *demurrer* over-ruling 74; *denying* motions 60-61. n. 71. 72. 291. 380. 386.; *deposit* to be paid over by register on confirming 309. or back on reversing former order 397.; *discharging*, vacating, setting aside, opening or varying former orders 293-5. 17. 51. 60. 68. 70-72. 285. 312. 316. 322. order for discharging

order for feigned issue and directing a reference 268. 275. order ex parte nisi to discharge ex parte *order absolute* 38. discharging for dilatoriness 100. 95; *directions* of decree to be followed 94. 103. 104; order or decree on reservation of further directions 145. n. 145-6. 123. and report on 230. n; *discontinuance* 68; *discovery*, decree for costs on 479; *dismissal* 59. n. 60. of motion 60-61. n. of petition against a bank 84. in original and cross cause after reference to referees 261-2. dismissal on appeal, after application for production of letters 354. of cross appeal and that it be entered nunc pro tunc 386. order to file 361. by consent for time to file petition and in default dismissal nunc pro tunc 363. order after filing appeal for dismissal for not filing 363. or by consent 364. for dismissal of appeal in part 364. without costs 364. with costs for want of prosecution but without prejudice 365. order to postpone motion on petition for dismissal 365. decree final on rehearing annulling former decree of dismissal, &c. 313. another reversing order of dismissal without costs of re-hearing 310; *dismissing* injunction, and dismissing petition against a bank 84. denying motion to dissolve 380. confirming on re-hearing, order on motion to dissolve 308. reversing on appeal, order dissolving 346. n. 347; *drawing* order 49.

E. Entering where 41. 9-11. *erroneous*, discharging 68; errors court of, see court, &c. *examination*, clerkship 14. before Master 91. 74. 183. n. 185-7. 153. n. *examiners'* fees 83; *exceptions*, confirming report in parts not excepted to 247. n. 250. overruling exceptions to report, or exceptions to report on exceptions to answer 353 and n. final decree (confirming former on rehearing,) on exceptions to report directing reference as to exceptions allowed and decreeing payment 317. decretal order on exceptions to report of referees 259 order on rehearing the last order for reference to Master 261; *execution* (see fi. fa. ca. sa.) of decree 17. to enforce contribution 464; *exemplification* of 33; *ex parte* order nisi to discharge ex parte order absolute 38; ex parte proof on re-hearing 306-7. n.

F. Feigned issue 267-275. in case of adultery 268. n. 272-4. or for reference and feigned issue 267. n. 268. 270-2. 275; reversal of an order for feigned issue 387; *fi. fa.* for arrears of rent against one defendant in favor of complainant 461. another in favor of defendants 461-2. to *file* petition of appeal 361. and dismissal for not filing 363; *Final* 145. n. 317. (see affirmance, reversal, confirming, annulling) of court of errors and appeal to sup. court of U. S. 397. 401, &c. final decree after one trial and verdict in favor of will 292. 268. n; *foreclosure* and sale 316 and n.; *formal parts* of orders and decrees 78; *foreign* testimony 26; *further directions*, see directions; *future defaults*, order for sale for interest, instalments, and to cover future defaults 316.

G. Guardian, appointment, removal, &c. by surrogate, order on appeal 334. maintenance and guardianship 115. 116.; *general* or special 74.

H Habitual drunkenness, order

for issue 274; *hearing*, decretal order on 85-7. orders on re-hearing, rejecting or admitting proof since hearing 306-7 and n; default at hearing order, denying motion to open 51. 71. 72.

I. Injunction, (see dissolving) decreeing it perpetual after one trial and verdict in favor of will 292. 268. n; *intent* of a former decree 322. 316; *interest* and costs 320; *instalments*, decree for sale and to cover future defaults 316; *irregularity* (see discharge for) 68. quashing appeal for, but without prejudice to another 365-6. after remittitur, to set aside for, a decree by default for not answering 360; *issue*, orders directing 267-8. n. habitual drunkard 274. taking issue as confessed 276. trial by jury of merchants 285. for trial at another circuit 286.

J. Jury of merchants 285.

L. Lien, costs 82. lunacy, discharging commission 291. setting aside lunatic's conveyance 85.

M. Maintenance, &c. 115. 116; *mandate* of s. c. of U. S. decree of court of errors on 426; *master*, order or ordering part for 94; merchants trial by 285; *minutes* of 40. (see minutes) *motion* orders on 60. 61. n. 84. to postpone motion on petition for dismissal in court of error 365. order limited to notice of 42. n. 90. n.

N. New trial 290; *nisi causa* 182. 62. 55, 37. 366. see attachment, examination, non-production 183. n. 185-7. 158. n. against sheriff 462-3. see confirmation, 247-250; *non-payment* 67. *non-performance*, 91.; *notice*, order accordingly 42. n. 90 n. saving benefit of notice 58 notice endorsed on order 88. *nunc pro tunc* 363. 386. 388.

O Opening orders and decrees (see discharging and opening, &c.) 293 5. 51. 71. 72. 60.; *original* and cross cause, dismissal after reference to referees 261-2.

P. Party, (see examination) order that cause stand over to make another party 315; *petition*, orders on, &c. 69. &c. limited to the prayer 42. n. 90. n. of appeal, see dismissal 364-5. to postpone motion on petition for dismissal 365.; to file petition 361. or dismissal 363. to answer petition 359. reversal for not answering 360; *plea* and answer to stand good in part 311. order on bill and plea, re-hearing 310. overruling plea or demurrer 74; *prejudice*, orders without (see without prejudice) 365-6; *pro confesso* 69. 440-5. costs ib. taking issue as confessed 276. opening decree by default at *hearing* 71. 72. see default; *production* of books, papers, &c. 152-7. 183. n. 185. 186-7. 354.; *proof* since hearing, decrees on re-hearing 306 and n. 307 and n.; *publication* for creditors to appear 104. *purchase money* into court, order &c. 134-5.

Q. Quashing appeal for irregularity, but without prejudice to another appeal 365-6.

R. Rectifying 293-5. see discharging, rectifying, &c.; *receiver* 79. n; *reference* to Master 90-6. 69. 70. 261. of course, what Master 95. to state an account 90. pay or transfer stock 81. assess moiety of expense of party wall 93. that third person interested may attend 100. notice endorsed on order 88. for reference and feigned issue 267. n. 268. 270-2.

275. to arbitrator 257 and n. or referees 259-262. of causes to Vice Chancellors 11. 12; *rehearing* 302-3. 306-323. conditional 302. denying in part 303. denying motion for, in court of errors 386. order on rehearing, exceptions to report of referees 261. 259; on bill and plea 310; *remanding* cause to bring in parties 386. *remittitur*, order to stay it on suggestion of appeal to supreme court of U. S. 389. on presenting remittitur in court below 395-6. after remittitur in court of Chancery 397. or in court of errors to set aside for irregularity the default on which the cause had been affirmed and remitted 360; *rent*, order for fi. fa. for arrears 461-2; report 125-6. see confirmation, exceptions, directions; *reservation* of further directions, decree on 145. n.; *retaxation* 455-7; *retraction* of admission 77. n; *reversal* court of error 387. of an order for feigned issue 387. on default in not answering petition of appeal 360. on appeal dissolving injunction 346. n. 347. reversal in part and affirmance in part 388-9. reversal in sup. court of U. S 422. in court of errors pursuant thereto and of the mandate of S. C. of U. S 426. in court of Chancery on filing remittitur 397. and for register to pay back deposit 397. in Chancery reversing order of dismissal without costs of rehearing 310. see annulling; *review*, clause in decree of court of errors allowing bill of review in court below 389; *rule of court*, making agreement such 19. 20. n. see arbitration.

S. Sale 125-6. 129. and foreclosure 316. n. to cover future defaults 316; *satisfaction* of mortgage 464-5; *setting aside* (see discharging, setting aside orders &c.) 293-5. 70. 71. 72. 360; *separate report*, decree on 125-6; *service*, 65. 87-90. *show cause*, see nisi causa; *sheriff*, order that he sell or show cause why attachment 462. do. to return execution, &c. 462-3. *Solicitor's lien* 82. *special* or general 74. or common 41. *stand over*, cause to, 315; to *stay* proceedings 37. remittitur on suggestion, &c 389; *Supreme court* of U. S. orders and decrees in after appeal 424; *Surrogates*, on appeal 334. 336.

T. Taxation, order affirming 457; *temporary* relief 37; *terms*, orders on 62. see conditional, default; *transcript* order to return and for time 335; *trial* by jury of merchants 285. at another circuit 286. decree final after 292. 268. n.

V. Vacating on rehearing 316. 322. (see discharging, &c.) or *varying* former orders, &c. (see ib.) 285. 293-5. 342. 60; *Vice Chancellors'* orders 11-12. 60. *wall*, order for assessing moiety of party wall expense 93; *will*, administration of assets under 115. 116. decree final after one trial and verdict in favor of will and for perpetual injunction 292. 268. n. appeal and decree as to will, &c. 350; *without prejudice*, orders without, &c. 74. 100. 365-6.

Ordinary—diligence, service 39.

Original, motions 19. petitions 17. 21. n.

Parol ev. or oral testimony 177.

Particular of estate 126-7. 129. 177.

Parties, death of pending appeal 386. description of 21. 27, in affidavits

27 n. 28. names, title 47; examination. and interrogatories 177-8. 91. 120. 157. 164-183-201. as witnesses 195. see examinations, certificate, commission &c. 148 152; petition amendment 46; want of remedied by consent 77; party wall 93.
Partition 177. 256.
Parochial extracts, register, &c. 30-31.
Partner and partnership 178. accounts 206. n. report 231 n.; so-solicitor, service 39. 56. 88. 98.
Passage and passenger 178.
Payment 178. 23. of costs 146 money out of court, costs 123-4. 450-3. or of money out of court 23. 30-2. 81. 111; purchase money into court 133 134-5.
Pauper causes, (see poor persons) Signature to papers 43. n.
Pedigree 178.
Peremptory—advertisment 103. 104. 108; attachment 139. 140. for costs or money 63-7; summons 96. 98. 125.
Performance 178.
Person, appearance in proper person 23. n. 37. 60; identity 178.
Personal estate examination, &c. 191. 178. do. and real 187.
Petition and Bill. general routine of proceedings applicable to both, (see Analysis,) 17 to 465; petitions and motions 17-19; to take affi. off file 59. n.; *Petitions* 17-23. of *appeal* from surrogate on settlement of accounts of executors or administrators 330. cross appeal in that case 332; on appointment removal, &c. of guardian 333; from common pleas 326-7; to court of Errors, various forms 350. to specified parts of decree 350. to order overruling exceptions to report 353. or exceptions to report on exceptions to answer 353. from decree of dismissal, &c. 354. to decree of chancellor on appeal from surrogate after appeal to circuit judge 356. filing &c. petition appeal 359. impertinence in 59. n.; petition for *confirmation* of separate report 123-4. 228; bill *costs* on motion or opposing petition 452-3. see 451; *hearing*, reference of 10-12. 72; taken *out* of the state 35; presenting petition to whom, &c. 44; to *refer* causes to vice chancellors 11. 10-12. 72; *reference* to master 100. 1. how reference speeded 95. 100; for *rehearing* 297; to *set aside* default opposed 51-4. (see orders discharging, &c.)
Piracy of copy right 266. n
Plea, truth, reference 74; on feigned issue 282. 262. n.; plea and answer, to stand good in part, order 311.
Points, 306, points and cases, court of errors 370-384.
Poor persons 43. n. order 73. appeal 366.
Possession 178. 42. n. mortgagee 146-7. purchaser 140. 132-3-5.
Postea. feigned issue 268. n.
Postponement, see adjournment.
Power of attorney 178. 62-4. demand of costs, ib.
Practice 9. 256-7. reference respecting 256-7; admission 12-16; report on 229.
Prayer, in petitions, bills 20. 21. n. 22; or for relief in notice of motion 42. n.
Precept in nature of peremptory attachment 139 140. for commitment for non-payment of costs 63. 67.
Preference 72. on calendar 11.
Prejudice without, &c. 75. 464. conducting suit without 76. consents without 75. decree without 74, or orders without 100. 365-6. of dis-

missal without 60.
Preliminary to suit 76. preliminary petitions 17.
Preparations for hearing 39-47-69.
Prescription 178.
Presenting bills, &c. 44-45.
Preservation of written evid. 178.
Presumptive evidence 178-9, 165-6.
Price of stock 179.
Principal and agent 179. 46.
Private instruments 179. stipulation 61. n.
Privileges, witnesses 179.
Probate 179.
Proceedings in Master's office 94. &c. at law 26.
Proceeds of sale 138.
Pro confesso (see default) on petition 69; taking issue as confessed 276; order 73. 74. setting aside 70. 71. 85.
Producing witnesses 74.
Production or inspection of books, papers and writings 152-7. 107. 110. letters, &c. 354. title deeds 19; clause in order 91. order for attachment 185-7. orders by Vice Chan. 11-12.
Professional courtesy 39. 48. 61. n.
Pro interesse suo 177. 179.
Proof 164-179-183.
Proper person 23. 37; see person.
Proposals 100. and state of facts 118. 224-6-8. 251.
Provisional charge 204
Purchase, purchaser 179. 127-135. 138-144. title deeds 156. enforcing purchace 138-40. master's office 100. purchase money 135. 138. 134. purchaser's costs 142-4.
Publication enlarged 41. n.
Quantity (see boundaries) 179.
Quantum damnificatus 91. 93. 267. n.
Quashing appeal 365.
Questions of law or fact, how settled in chancery (see Modes of, &c.) 256-293; question reserved 47 (see equity reserved.)
Quo warranto 179.
Re-advertisment 131.
Real estate, account 144. see account, sales by master 125. &c.
Receipt 179.
Receiver 179. 218. n. attorney to 58. against bank 84. orders 37. 38. 79. n. dismissing petition against bank 84. notice, motion 42. n.
Recital 179.
Records 179. and transcripts 179. verifying by, 23. 179.
Rectifying orders, &c. 293-5. errors in minutes below 384.
Redeeming mortgages 90. 91.
References 90-94. and proceedings in master's office 94. &c.; to master, register &c. referees or arbitrators 256-262. to a counsellor at law of an appeal in court of errors 385-6; or to or by vice chancellors 10-12. 45. 72. 85; reference and feigned issue 267. n. 270-2; reference for admission 12-13. 14; conveynace, to settle draft 137-8; costs on 437. & n.; evidence, on reference under petition, motion of decree 101; on exceptions allo'd to report 317. of hearing of causes to vice chancellors 10-12. 45. 72. 85; for impertinence or scandal 24-26. 59. n. 100; order for 88, of course 73-74. for receiver 37. 38; for payment or transfer 81; on petition when not, 70. n. prayer for 22; speeding reference, or committing it to another 95, 100; on title 135-7. 18; to or by vice chancellors, *ante*.
Refusal, costs 62-66.
Register and registry 179.
Register, assistant Register and clerks of court, as to admission 12. approval of sureties 343. and rule of court 172; certificates 32-33. 123-4; duty on enrolment 458-460; to designate masters in N-Y. 95; office hours 12; referenc-

to on questions of practice 256-7.
Regulation of proceedings, in master's office 100-3.
Re-hearing 295-323. 346. n.; by appealed motion, 60. and n. order on for reference to master after reference to referees 261; court of errors order denying motion for 386; second re-hearing 322.
Relation back, order 93.
Relationship 180.
Release of interest 180.
Relevancy, motions 41.
Relief prayed for 21. n. 22. general, in notice for 42. n.
Remainderman 19.
Remanding cause on death of appellant 386.
Remittitur 390. 393. 394-7. order after 384-5. in court of errors 360 to stay remittitur on suggestion of an intended appeal to supreme court of U. S. 389. remittitur and proceedings after decree of court of errors pursuant to decree and mandate of supreme court of U. S. 428; remittitur, bill of review 389.
Removal of causes from chancery to circuit court of U. S. 399-401; from vice chancellors, 9; of guardian by surrogate, appeal 333.
Rent, execution 461-2. rents, issues, &c. 180.
Reports and proceedings thereon 226-256. general 145. 230-241. 125. 106. separate or special 106. 114. 18. 125-6. 226-230; objections to and settling 241-7. exceptions and confirmation 247-256; report, administration of assets, &c. 109; of examiners as to admission 15; of impertinence of interrogations 199. n; of referees, decree on 259; of sale 132; on taxation 455; on title 137.
Replying to affidavits 45. 4. 59.
Reputation 180. 165.
Request, to enter orders 433. n.
Re-sale 131. 138-9. 142-4. 40.
Reservation of questions of practice and costs 47; reserved biddings 129. 130.
Res judicata 180.
Restoring motions 68.
Retaxation 454-7.
Retracting admission 77 n..
Return—of executions, attachment, orders 462; of commission 75, 76; of summons, and further proceedings in master's office 100; transcripts &c. 359; writ of error, citation, transcript, to sup. court of U. S. 415-19.
Reversal, court of errors 360, 387, in part and affirmance in part 388; of order directing feigned issue 387; by supreme court of U. S. 422, and court of errors thereon 426, and court of chancery pursuant to the decree of court of errors 397.
Review, (see bill of,) of report 246.
Right, title, &c. verifying it 23-24.
Rule of court, submission, award &c. 23-24, 258 n.
Sales 180, 128-131, 124, by master, advertisement &c., report of purchase, paying in purchase money, title, report thereon, exceptions, deeds, possession, opening biddings, resale &c. 125-144, 128-131.
Sanity 180.
Satisfaction 464, of mortgage, decreed 86-7, certificate of, pursuant to the decree 464-5.
Scandal and impertinence 21 n., in affidavits 24, 25, exceptions for in petitions, affidavits &c. 59 & n.; before master 26, for scandal, impertinence, or insufficiency 199-201.
Schedules 230, see reports.

Sealed instruments 180.
Seal 180.
Seamen 180.
Searches 180.
Secondary ev. 180, 165.
Secretary of state 180.
Security for costs 85.
Seisin 180.
Senate journals 180.
Separate reports, (see reports,) 106, 114, 226-230, see 230-256, costs 123-5.
Separation 180.
Sequestration, contempt, costs 63.
Service 36-39, 54-58, affidavits 54-58, 269; on attorney in same office 99; computation of 97; of copies 21, 36; irregularity 60; mutual, of all papers 69, 101; of notice &c. 52; of orders and decrees 87-90, 65, of order, affit. of &c. 88 & n., and demand of costs 62, 63-64, &c.; of petitions 18; preparations 36; summons 96, 97 & n.; of writ of error to supreme court of U. S. 411.
Set-off 8, 202 n., 203 n., 180.
Setting aside—conveyance for lunacy 85; on costs 62-63; default 51-54, 70; default in court of errors 360; for irregularity 84; orders and decrees 84, 293-5; or proceedings 68.
Setting down cause 10.
Settlement of conveyance 146.
Settling report 227, 240-7.
Several—see joint and several.
Sheriff 180, attachment against, orders 462-3; duty. 180 as to process of contempt 449 n.; services, costs 449 & n.; duty and liability, see 463 n.
Ship 180.
Short brief for ordinary applications 49, or special motions 50.
Showing cause, (see orders, nisi, &c.) 37, 38, showing original on service 62, 63, 88, 89.
Signature 29. 34, 43, to petitions, bills, &c. 20, 23, to affidavit 27, of counsel to petition 23 n., solicitor, notice 52.
Simple contract, charge in master's office 202 n., 205, 208.
Situation, office, &c. 180.
Slandering a witness 180.
Solicitors 180; admission to practice 12-16; to petition, bills, &c. 23 & n.; one solicititor for all parties 44, 124, 206 n; affidavit by 28, 29, 25, before 34 n., of service 98, duty to file affidavits 69 n.; brief 48, 49, and consultation with counsel, ib.; liability for scandal 25, when not liable for costs or interest on money collected 320; lien cost, order, 82, 457; notice, motion 43; oath 12, 15; partner, service on 88; service 39, 55-57; signature 43; verifying proceedings 23.
Solvency 180.
Special—case to a court of law 263-6, decree 74, jurat 35; jury of merchants 285; motions 41, and affidavit 28 n.; (see motions;) order, adjournment 46; reports 114-18, 125-6, 106, 226-9, 251; (see reports;) terms of vice-chancellors 43 n., 44 n..
Specialty charge 202 n., 207, 208, 212, 214.
Specific performance 246 n., nonperformance, damages to be assessed 91, 92, title reference 18.
Specification 72.
Speeding reference 105.
Standing over petitions, motions 45, 46, order 315, costs 12.
Stated terms, vice-chancellor's 43.
Stating accounts 90; see accounts.
Statement, or notice in nature of appeal (see notice) 325, 328, statement or abstract on enrolment 458,460.
State of facts — 100, 106, 122, and

apportionment among creditors 220-4, and claims 215-17, and proposals, separate report thereon of debts and legacies, or for guardianship and maintenance 114-18, 224-6, affidavit in support thereof ib. costs 123; warrant 101 n.; state of facts and charges 218; and objections to creditors' claims 121-2, 220; state of facts on reference to inquire the value of goods 202 n.
State laws 180. state officers 180.
Stating part, petitions, bills 20. 21.
Statutory intendment 180.
Stay of proceedings 37. 70. on appeal 329. 343.
Stipulations, between solicitors 75-8. offer, costs 61. n. default, costs 70. fixing day of argument court of errors 370.
Stock 146. 147. 24. 81. 57-8.
Stockholder 180.
Student, affidavit 28. joint affidavit 29. 30.
Subscribing witnesses 180-1. affidavit 65.
Submission, rule of court 19. 256-262.
Subpœna, order for 73. ad test. 197. n.
Subsequent interest 147. charge 210.
Substituted service 37. 38. 141.
Suggestion 69. n. of counsel 41, in brief 48. 49.
Suit 17. 430-1. n. consolidated 93.
Summary applications 18. 19. interference 83.
Summons and service 96-100. or warrrants 101. and n. 102. for examination 183. n. to bring in accounts 104. to proceed on accounts 112. 113, produce books, &c. 110; on proposal and state of facts for maintenance 118. on sales 127. to bring in taxed bills 124-5. on title 135-8.
Sunday 97.
Suplemental affidavits 33. 34. 46. 63. 69. answer 61.
Supreme court of U. S. appeal 397-428.
Surrogates' appeals 327-338-341. 356. 382
Survey, surveyor 126. 130. 181.
Taking off the file 24-26, 59. n., taking and stating accounts 90. 113.
Tax, motion for payment, costs 450-3.
Taxation, retaxation and taxing officers 454-7.
Temporary relief 37. 84.
Tender 181. of costs 62. 61. n.
Tenants 127 for life 19.
Terms of vice chancellors 43. 44. 11.
Testator and his relations 181. estate real and personal. examination of defendant 187-191.
Testimony 181. 164-183. abroad 26.
Third persons, service 36; consenting to be bound by decree 77; interested on reference 95. 96. 100.
Time (see computation) of service 52. day 60. enlarging 58.
Title 181. reference, &c. 135-7. 18-19. 181. 246. n 247. n deeds of estate, production, &c 19. 152-6. 136. 181 on sales. 127. 128. 141-2. 181; verifying title or right of party 23, 24. *title of cause* 49. 27. in affidavits 27. brief 49. petitions 20. 21. orders 79. 49; in court of errors 359.
Tradition 181.
Transcripts 181. transcript and minutes, &c. court of errors 359; common pleas 326. n.; orders for return on appeal from surrogates 325 form of 336; of decree sent to supreme court 458-460; of record and return to writ of error to supreme court of U. S. 417
Transfer of stock or funds in court 181. 24. 30. 57-8. 146. at age 147-8. reference 81.

Translation. Translator 26. 27. 164. 181.
Trial at law 26. on petitions or motions 45. 46. trial record. feigned issue 268. n 283. 286-7.
Trust and trustee 181 order to account 90. trustee executor accounting 125. interrogatories, &c. 159. 164-183-201. trustee creditor's charge, affidavit 213. costs 87.
Truth of plea, order reference 74.
Ultimate balance, in accounting 111.
Understanding 181.
Underwriting on summons or warrant in master's office 96. 97. and n. 101. and n. 102. 118. 136.
Usage 181.
Usury 181.
Value of land 181.
Valuable consideration 181.
Variances and mistakes 181.
Vendor 181-2.
Verification of petitions, bills, &c. 23-27-35, 22 n., of extracts 30, abroad 35, 36.
Vice-Chancellors 9-12-13, 60 & n., appeals from ib. and 341 to 348-9 &c. hearing &c. 72, filing papers 247, petitions 44, orders and decrees, and appealed motion 60 & n., 85, terms 43.
Vigilance 59 n., 68, 71, 100.
Viva voce examination 120, 122, 183 n.
Voire dire 182.
Voluntary — affidavits 26, 45, deed 182, dismissal 68, 76, settlement 182.
Voyage 182.
Waiver 75, 68, 182, by answering or replying 24, 25, 59, by consent 61 n., by delay 59 n., of irregularities 23 n.
Warrant or summons 101, 96.
Warranty 182.
Wife's equity 256, 263, wife petitioning 51.
Wills 182, admitting or refusing probate, appeal 338 41, case on appeal 382; decree 350 after issue tried and one verdict in favor 292, costs 293-4.
Without prejudice—agreements, orders, &c., without &c. 75, 76, 100 365-6, 464.
Witnesses 182-3, impeached ib. affidavits 69, interrogatories and examination 158, 163-4, 195-9; party examined as witness 195, certificate, commission to examine 148-152, of witnesses and creditors ib., witness to signature or mark 29, 23 n., 34.
Writ ad quod damnum 19.
Writ of error from court of errors to supreme court of U. S. 407-412.
Written evidence 183, request, costs 433 n..
Writings 183.

CORRECTIONS TO BE MADE IN VOL. I.

Write 'his Solicitor' instead of 'he' in p. 23. in 3d line from top.
'a Precept' 'the order' in p. 31. in 9th
'(30)' '(28)' in p. 87. bottom of the page.
'continued' 'discontinued' in p. 73. 17th 18th lines.
'appear' 'appeal' in p. 105. 2d line.
'chap. IV.' 'chap. III.' in p. 124. 125. and 126 at top.
'chap. V.' 'chap. II.' in p. 148.
'173' '731' in p. 173.
'266' '270' in p. 266.
'270' '269' in p. 270.
'§ 68' 302. over marginal note.
'will be waived;' 'waived is' in p. 266. 20th line.
Transpose 'petition' and 'bill' in p. 76. 3d. line.
'estate' and 'sale' in p. 211. marginal note to § 17.
Erase 'or by the Chancellor during term' in p. 38. see R. 98. as finally adopted.
'might' in p. 279. 13th line.
Add 'ch. I.' to 'ante § 18.' in p. 83. end of the paragraph.
'§ 46.' 325. line 17th.
'(2)' after the word 'cause' 84. 11th line.

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